82-1734

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LINDA SIDOTI PALMORE
Petitioner

v.

ANTHONY J. SIDOTI,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT A COURT FROM CONSIDERING OR FROM RELYING UPON A SUBSEQUENT INTERRACIAL MARRIAGE OF THE CUSTODIAL PARENT AS A GROUND FOR ORDERING A CHANGE OF CUSTODY.

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The Petitioner, LINDA SIDOTI PALMORE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District entered in this proceeding on January 24, 1983.

OPINION BELOW

The Circuit Court of the Thirteenth Judicial Circuit of the State of Florida entered an Order on Modification of Final Judgment on March 1, 1982. The opinion of the Florida Circuit Court is reprinted in the appendix A to this Petition. The Petitioner timely appealed to the Florida District Court of Appeal, Second District, which affirmed the judgment of the Florida Circuit Court without issuing an opinion. That Court's Order of Affirmance is reprinted in appendix B to this Petition.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, Second District was entered on December 8, 1982. Petitioner

timely filed a Petition for Rehearing and a Motion to Stay the Mandate with the Second District Court of Appeal in order to permit her to file a Petition for Certiorari in this Court. On January 24, 1983 the Second District Court of Appeal denied the Petition for Rehearing and denied the Motion to Stay the Mandate. That Order is reprinted in appendix C to this Petition.

The jurisidiction of this Court to review the case on Petition for Certiorari rests on 28 U.S.C.§1257(3). Because the Second District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the Second District Court of Appeal is the highest state court in which a decision could be had. Fla.Const. Art. V §3(b)(3); Florida Supreme Court Manual of Internal Operating Procedures, II A1.(a) 396 So.2d LXXXV; Jenkins v. State, 385 So.2d 1356(Fla. 1980).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution reprinted in Appendix D to this petition.

STATEMENT OF THE CASE

On May 29, 1980, the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida entered a Final Judgment dissolving the marriage of Petitioner to Respondent and awarding Petitioner custody of Melanie Lynn Sidoti, a child born June 24, 1977 The Circuit Court found that she was a "fit and proper person to have such custody."

On September 20, 1981, the Respondent filed a Petition to Modify the Final Judgment in the Circuit Court and sought custody of the minor child. At the time the Petition for Modification of Final Judgment was filed the Petitioner was cohabiting with her fiance Clarence Palmore (now husband) whom she married on November 21, 1981. The Petitioner's household consisted of herself, her fiance (later husband), her seventeen year old son by a previous marriage and the minor

child, Melanie.

The Respondent's Petition For Modification alleged that the Petitioner ". . . certainly has not acted in the best interest and welfare of said minor child in that she has had a black male living with her for some period of time, and may even still be living with her. . ." and that this has created a bad environment for the child. The Respondent also alleged that the child was found with an infestation of head lice on two occasions and with clothing stained with mildew and that those conditions were indicative of some degree of neglect by the Petitioner.

Following a hearing, on March 1, 1982, the Circuit Court entered an Order on Modification of Final Judgment finding that the Petitioner had brought a man into her home and carried on a sexual relationship with him without being married to him and that "such action tended to place gratification of her own desire ahead of her concern for the

child's future welfare." The Circuit Court also noted that there was evidence that the Petitioner did have one other male friend at the home on an occasion.

The court found that both parties had remarried, and that there was no issue as to either party's devotion to the child, adequacy of housing facilities or respectability of the new spouse of either parent. The Circuit Court observed that:

> "despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressure, suffer from the social stigmatization that is sure to come."

Accordingly, the Circuit Court entered an Order modifying the Final Judgment to award Respondent custody of the child, having found that there was substantial competent evidence of changed circumstances and that the best interest of the child will be served by awarding custody of the minor child to the Respondent. The Circuit Court's Order is

reprinted in appendix A to this Petition.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON

After the trial of this matter, the Circuit Court sent a "memo" on February 4, 1982 to Counsel for the Parties which was substantially the same as the Order on Modification of Final Judgment. This memo directed Counsel for Respondent to prepare an Order on Modification of Final Judgment which awarded custody of the child to Respondent.

On February 10, 1982 the Petitioner filed a "Memorandum Stating Objections to Memorandum of Court" in the Circuit Court. That Memorandum stated as follows:

> . . . [petitioner] submits that deprivation of her child by reason of her interracial marriage violates her rights to privacy, equal protection and due process of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Constitution of the State of Florida. [Petitioner] also submits that said deprivation violates her and her husband's right to be free from the badges of slavery as guaranteed by the Thirteenth Amendment to the United States Constitution.

The Circuit Court entered its Order on Modification of Final Judgment on March 1, 1982.

Following the denial of Petitioner's Motion for Stay Pending Appeal, Petitioner filed a Motion for Review of Denial of Motion for Stay Pending Appeal in the Second District Court of Appeal on April 14, 1982. In the memorandum in support of that Motion the Petitioner stated as follows with respect to the Order:

> The Order in effect, holds that the wife, by her interracial marriage has forfeited the custody of her child. This results in an infringement upon the wife's right to remarry a person of another race and therefore her right to privacy, equal protection and due process of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Constitution of the State of Florida.

On May 13, 1982, the Second District Court of Appeal, without opinion, ordered that the Motion for Review was granted and that the change of custody ordered in the

final Order on Modification was stayed pending appeal. The order of the Second District Court of Appeal is reprinted in appendix E to this Petition

In Petitioner's Initial Brief before the Second District Court of Appeal the Petitioner again cited the Fourteenth Amendment to the United States Constitution, Loving v. Virginia, 388 U.S. 1 (1967) and McLaughlin v. Florida, 379 U.S. 184 (1964) and stated as follows:

> . . . the decision infringes upon the wife's right to marry a person of another race and thus violates the wife's right to equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Sections 2 and 9 of the Constitution of the State of Florida.

On December 8, 1982 the Second District Court of Appeal affirmed the Judgment of the Circuit Court without issuing an opinion. That Court's order of affirmance is reprinted in Appendix B to this Petition.

Petitioner timely filed a Petition for

Rehearing and a Motion to Stay the Mandate with the Second District Court of Appeal. In the Petition for Rehearing, Petitioner, citing Santosky v. Kramer, 102 S. Ct. 1388, Personnel Administrator of Massachusetts vs. Feeney, 442 U.S. 256 and the Fourteenth Amendment to the United States Constitution, stated as follows:

> Recent decisions of the Supreme Court of the United States and the Supreme Court of Florida make it clear that as a matter of law it is impermissible to consider the race of [petitioner's] husband in evaluating whether the best interest of her child would be served by a modification of the decree awarding her custody.

In the Motion to Stay Mandate the Petitioner moved the Second District Court of Appeal, to stay its mandate should the Court deny the Petition for Rehearing pending the filing and disposition of a Petition for Certiorari in this Court. In the Motion Petitioner again citing Loving v. Virginia, 388 U.S. 1 (1967) stated that "prior decisions of the Supreme Court appear to prohibit

consideration of race" as a grounds relevant to modification of a custody order.

On January 24, 1983, the Second District Court of Appeal denied the Petition for Rehearing and denied the Motion to Stay the Mandate. That Order is reprinted in appendix C to this Petition.

REASONS FOR GRANTING THE WRIT

The Decision Decides A Federal Question In A Way In Conflict With Applicable Decisions Of This Court Which Prohibit Explicit Racial Classifications

The Decision of the trial court relied almost exclusively upon racial considerations in ordering a change in custody. The Order found as a matter of fact that both parties had remarried and "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." The Order made no findings concerning what the trial court characterizes as Respondent's secondary allegations regarding the mildewed dress or head lice.

Although the Order makes a passing reference to Petitioner's sexual relationship with her current husband prior to their marriage, that relationship is irrelevant under Florida law absent evidence of adverse effect upon the child. Culpepper v. Culpepper, 408 So.2d 728 (Fla. Dist. Ct. App. 1982). (Wife's sexual relationship irrelevant in change of custody proceedings absent evidence and finding of adverse effect upon child). No evidence of adverse effect was offered and no finding of adverse effect was made. See also Dinkel v. Dinkel, 332 So.2d 22(Fla. 1975). (Adultery relevant to initial custody determination only when shown to adversely effect the child). There was no allegation of adultery made in this case.

That there was no adverse effect on the child was clear from the testimony given at the trial. The most important excerpt of the trial on this point is reprinted in Appendix F to this Petition. Clearly, there was no judicial finding that the child was adversely

affected by the Petitioner's new husband. Therefore no adequate and independent state ground exists for the decision below.

In short, since the finding of fact regarding Petitioner's sexual relationship with her current husband prior to their marriage is of no legal consequence under Florida Law, the only ground upon which the Order rests is the fact of Petitioner's subsequent interracial marriage.

In relying upon race, the trial court followed the earlier direction of the Second District Court of Appeal in Niles v. Niles, 299 So.2d 162 (Fla. Dist. Ct. App. 1974). In Niles, the court established the rule in Florida inviting judges to take interracial marriages into account in custody proceedings. Underlying the Niles rule that a subsequent interracial marriage is intrinsically relevant in custody proceedings is a judicial assumption that an interracial home is inherently detrimental to the best interest of

white children.[1]

Thus, the Niles rule as applied in this case rests upon an explicit impermissible racial classification, since the Court took into account Petitioner's remarriage solely because her husband is black. On the other hand, the Trial Court's Order does not consider the effect upon the child of Respondent's remarriage to a white woman.

This Court has repeatedly held that racial classifications are inherently suspect, justified by only the most compelling governmental interest. In McLaughlin v. Florida, 379 U.S. 184 (1964) this Court struck down on equal protection grounds a Florida Statute which made interracial cohabitation of unmarried persons punishable but did not proscribe cohabitation by unmarried persons of the same race. In Loving v. Virgina, 388 U.S. 1 this Court struck down criminal anti-miscegenation laws

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[1] Judicial concern over the effect of an interracial marriage appears to arise only when the child in question is white.

in Virginia. In doing so the Court used the following language:

> The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and can not be infringed by the State. 388 U.S. at 12.

The reasoning behind the Loving case was that the statute in question constituted a restriction of the rights of citizens on account of race. The Court stated that any restriction of the freedom to marry solely because of racial classifications violates the central meaning of the equal protection clause. 388 U.S. at 12.

The other basis of the decision was that the statutes in questions deprived the individuals of liberty without due process of law in violation of the due process clause of the Fourteenth Amendment. The Court noted that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of

happiness by free men. Marriage is one of the "basic civil rights of man" fundamental to our very existence and survival. Skinner vs. Oklahoma, 316 U.S. 535, 541 (1942).

The Court concluded that to deny this fundamental freedom on the basis of a racial a racial classification embodied in the statute in question is to deprive citizens of liberty without due process of law.

This Court in Loving held that where a statute draws a classification based on race, the state, in the case of legislation, is required to meet the very heavy burden of showing that the distinction made between interracial marriages and other marriages was "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate" and racial classifications are subjected to the "most rigid scrutiny." 388 U.S. at 11.

In Personnel Administrator of Massa-

chusetts v. Feeney, 442 U. S. 256 (1981), this Court summarizing many of its decisions, stated that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification." 442 U.S. et 272.

Most recently in Santosky v. Kramer, 102 S. Ct. 1388 (1982) this Court held that "freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 102 S. Ct. at 1394.

Therefore it is clear that this Court has long recognized the freedom of a person to marry a person of another race without infringement on that right by the State.

No modern decision of this Court has sustained a racial classification which burdens or stigmatizes black citizens on the basis of race. In spite of that unbroken line of cases, the decision below and the Florida rule upon which it rests punishes the

Petitioner by depriving her of her child because she remarried a black man.

The decision below also stigmatizes Petitioner's new husband because of his race and burdens Petitioner solely because she married him. In short, her interracial marriage has, in effect, disqualified her from being a custodial parent without any justification. The decision thus irreconcilably conflicts with the many decisions of this Court interpreting the equal protection and due process clauses to prohibit state-sponsored racial discrimination.

The equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution prohibit a court from considering or from relying upon a subsequent interracial marriage of the custodial parent as a ground for ordering a change of custody.

THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE COURTS OF OTHER STATES HOLDING THAT THE FOURTEENTH AMENDMENT PROHIBITS CONSIDERATION OF AN INTERRACIAL MARRIAGE IN CUSTODY LITIGATION.

The highest courts of Pennsylvania[2] and Michigan[3] have held impermissible the consideration of a subsequent interracial marriage in custody litigation. Courts in Florida, and apparently in Iowa[4] and Illinois[5] consider interracial marriages, although no other case so clearly rests a change of custody upon racial considerations as does the instant case.

IMPORTANCE OF QUESTIONS PRESENTED

To deprive a woman of her child because she remarried a respectable man who has black skin is alien to the concept of the Fourteenth Amendment that "no state shall . . .

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2 Myers v. Myers, 468 Pa. 134, 360 A.2d 578 (1976); Commonwealth ex rel Lucas v. Kriescher, 450 Pa. 352, 299 A.2d 243 (1973).

3 Potter v. Potter, 372 Mich. 637, 127 N.W.2d 320 (1964); Edel v. Edel, 97 Mich. App. 266, 293 N.W.2d 792 (1980).

4 Kramer v. Kramer, 297 N.W. 2d 359 (Iowa 1980).

5 Russell v. Russell, 80 Ill. App 3d 41, 399 N.E.2d 212 (App. Ct. 1979); Langin v. Langin, 2 Ill. App. 3d 544, 276 N.E. 2d 822 (App. Ct. 1971)

deny to any person within its jurisdiction the equal protection of the laws." In this era when courts are asked to infer the existence of race discrimination from elaborate statistical analyses, and thousands of pages of testimony regarding motive and intent, this Court has before it a short decision of the Circuit Court which relies upon an explicit, impermissible racial classification to burden the Petitioner's fundamental rights. That a child can be taken away from her mother because a Circuit Court Judge has speculated that the minor child will suffer from social stigmatization as a result her mother's remarriage to a black man is shocking and cannot be sustained.

The holding below, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state-enforced racial distinctions. The real message of the decision below is that while Petitioner could not be imprisoned for her remarriage to a black man

she could be deprived of her child as punishment.

On a larger scale, the decision of the Circuit Court fosters the attitude that an interracial home is inherently detrimental to the interest of white children when there is absolutely no empirical or other evidence to support that proposition. The decision also promotes and gives credence to the attitude that relationships between blacks and whites are forbidden and offensive, and therefore should be regulated.

Some individuals see this type of decision as giving them a green light to take steps to curb interracial relationships no matter how casual, in their own way.

For example, according to a St. Petersburg Times newspaper account, on March 24, 1983 two white men were sitting in a Tampa restaurant when two black men and two white women walked. One of the white men asked a nearby woman "if niggers offended [her]." The woman then overheard one of the

white men say "I wish I had my gun."

The account continues that on his way out of the restaurant one of the white men "paused, turned and looked at the two couples and placed his hand on the knife" he was wearing on his belt. When the assistant manager of the restaurant asked one of the white men who was paying for his meal if everything was all right, the man replied fine "except for the niggers." The assistant manager replied "I'm sorry. There is nothing I can do about that." The white man replied "yes there is" and walked out.

One of the two white men had a 44-Magnum pistol in their truck and they waited in the truck for fifteen to twenty minutes for the black man to leave. Then, the white men followed the black men's car for about eight miles before firing two shots into the car, killing one black man and wounding the other.[6]

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[6] The St. Petersburg Times, April 8, 1983, section B, B1, columns 7 and 8.

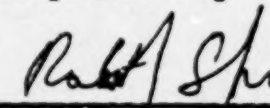
No court which is sworn to uphold the constitutionally protected guarantee of equal protection of the laws can issue a decision which bows to the existence of racism as a fact of American life. In so doing, a court judicially institutionalizes and sanctions the blight the Fourteenth Amendment was designed to eradicate.

This Court cannot eliminate racism in American society but it can and should review this decision which has deprived Petitioner of her child because of her remarriage to a black man.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Second District Court of Appeal.

Respectfully submitted,



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Date: April 23, 1983

APPENDIX A

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY, FAMILY LAW

In Re: The Marriage of	:	
ANTHONY J. SIDOTI,	:	CASE NO:80-1915
Husband,	:	DIVISION D
and	:	
LINDA SIDOTI,	:	
Wife.	:	

ORDER ON MODIFICATION OF FINAL JUDGMENT

THIS CAUSE having come on to be heard upon the Petition of ANTHONY J. SIDOTI, father of the minor child, MELANIE LYNN SIDOTI, born June 214, 1977, seeking custody of said minor child, and the mother, LINDA SIDOTI PALMORE, having responsed (sic) to said Petition and further requesting the Circuit Court Counsellor to conduct a social investigation relative to this cause, and the Court having considered the testmony of the respective parties, as well as the report relative to said social investigation, and

the Court being otherwise fully advised in the premises, finds as follows:

1. That both parties have remarried, and there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility of the new spouse of either parent.

2. That the Husband's allegations pertaining to the material change in circumstances are that the Wife's close association with her present husband, a black male about 10 years her junior, prior to her November 21, 1981 marriage to him, created a bad environment for the child. Secondarily he says that the child was found with an infestation of head lice on two occasions and with clothing stained by mildew and that those conditions are indicative of some degree of neglect by the Wife.

3. That the Wife did not dispute the fact that she was cohabiting with her present husband whila a single woman but insists that no sexual activity of any nature ever took

place in the presence of Melanie. LINDA SIDOTI PALMORE has custody of a 17 year old son by a previous marriage and that the household consists of herself, her husband, teen age son and Melanie. Melanie is in a day care for 8 hours daily.

4. The Court has received the benefit of a home investigation study made by Mr. John C. Knight, Jr., a senior, well trained and experienced member of the Court Counselor serving this Circuit. He is, by sheer coincidence, the same counsellor who made a report in a case coming out of this circuit also involving the social consequences of an interracial marriage. Niles v. Niles, 299 So.2d 162. Although there were other elements in Niles not present here, e.g. emotional instability of the mother, there was evidence that the mother entertained men in the home overnight while the children were present. In the present case, the evidence is that the mother did have one other male friend at the home on an accasion (sic), and

that she shared her bed with Mr. Palmore for a period of time before they married. The court counsellor's reasoning is the same as it was in Niles, when he recommended removal of the child from the mother because she "had chosen for herself and therefore for herself and the children, a life style unacceptable to the father of the children, a life style unacceptable to the father of the children and the society in which we live."

5. The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will,

if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

6. There being substantial competent evidence of changed cirsumstances and that the best interest of the child will be served by awarding custody of the minor child to the father, it is, thereupon,

ORDERED AND ADJUDGED that the Final Judgment heretofore entered in this case be modified as follows:

A. That the Husband/Father, ANTHONY J. SIDOTI, be, and he is hereby, granted custody of the minor child of the parties, to-wit: MALANIE (sic) LYNN SIDOTI, effective immediately.

B. That the Wife/Mother, LINDA A. SIDOTI PALMORE, is hereby granted reasonable visitation privileges with said minor child.

C. That the previous child support payment required by the Husband is terminated.

D. That both the Husband and Wife are

hereby restricting from removing the minor child from the jurisdiction of this Court without prior court approval.

E. That each of the parties hereto shall pay his or her own counsel fees and costs.

DONE AND ORDERED in Chambers, at Tampa, Hillsborough, County, Florida this 1st day of March, 1982.

/s/ MORISON BUCK
Circuit Judge

APPENDIX B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LINDA SIDOTI PALMORE,	)	
Appellant,	)	
v.	)	CASE NO. 82-739
ANTHONY J. SIDOTI,	)	
Appellee.	)	

Opinion filed December 8, 1982

Appeal from the Circuit Court for Hillsborough County; Morison Buck, Judge

Robert J. Shapiro, Tampa, for Appellant.

Robert H. Carlton, Tampa, for Appellee

PER CURIAM

Affirmed.

OTT, CJ., and SCHEB and DANAHY, JJ., Concur.

APPENDIX C

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

LINDA SIDOTI PALMORE Appellant, v. ANTHONY J. SIDOTI, Appellee.	]]]]]]]]]]]	Case No. 82-739

Counsel for appellant having filed a motion for rehearing in the above-styled upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED that appellant's motion to stay mandate is denied.

APPENDIX D

The Fourteenth Amendment to the United States Constitution reads in pertinent part,

> "Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

APPENDIX E

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

May 13, 1982

LINDA SIDOTI PALMORE Appellant, v. ANTHONY J. SIDOTI, Appellee.	]]]]]]]]]]]	Case No. 82-739

Counsel for appellant having filed a Motion for Review of Denial of Motion for Stay Pending Appeal, upon consideration, it is

ORDERED that the motion is granted and the change of custody ordered in the final order on modification is hereby stayed pending this appeal.

APPENDIX F

Mr. Sidoti: But I feel that the environment that is caused by a mixed marriage, is just a strain on Melanie.

***

Mr. Shapiro: So, your objection-

Mr. Sidoti: is the effect on my daughter, because of this marriage.

Mr. Shapiro: Have you ever had your daughter examined by a psychiatrist or a psychologist?

Mr. Sidoti: No.

Mr. Shapiro: Do you know -has any professional person such as a psychologist or psychiatrist indicated that Melanie was suffering some effect as a result from livng with a, within a mixed marriage?

Mr. Sidoti: No. Not a professional but she's smart enough and old enough where she knows that she does not.

Mr. Shapiro: You know of no professional who's indicated this is deleterious to her well-being do you?

Mr. Sidoti: No.

Trial Transcript pps 4-5

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ALEXANDER L. STEVAS,

82-1734

NO. A-664

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LINDA SIDOTI PALMORE,
Petitioner

v.

ANTHONY J. SIDOTI,
Respondent

WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit a court from considering racial attitudes as one of several factors influencing the welfare of the child for purposes of child custody determinations.

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Reason Number I. 3

THE JUDGMENTS OF THE FLORIDA COURTS ARE NOT SOLELY BASED ON THE CONSTITUTIONAL QUESTION RAISED BY PETITIONER.

Reason Number II. 7

THE DECISIONS BELOW DO NOT CONFLICT WITH ANY FEDERAL OR STATE COURT HOLDING PROHIBITING CONSIDERATION OF COMMUNITY, PRIVATE OR GENERAL RACIAL ATTITUDES IN DETERMINING THE BEST INTERESTS OF THE CHILD

Reason Number III. 9

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STATEMENT OF THE CASE

In addition to Petitioner's Statement of the Case, Respondent would show additional factual matters that were brought out at the change of custody hearing; which matters were reflected in the judgment entered by the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida (hereinafter the "Circuit Court"). The primary holding of such judgment being that the best interest of the child (hereinafter "Melanie") would be served by a change of custody to Respondent.

An ear infection periodically inflicted Melanie. Respondent related that medication was necessary to alleviate this problem, but Petitioner's failure to properly administer the medication necessitated the Respondent going to the day care center in order to get it done. Additionally, on two

occasions Melanie had contracted head lice, and Petitioner, during her testimony, exhibited a strikingly casual attitude to the condition. Excerpts of Respondent's testimony concerning these matters are reprinted in Appendix "A" to this brief.

In addition to the head lice testiony, Petitioner testified to the following facts. Melanie is required to spend at least eight hours per day at a day-care center. It was at the day care center that she contracted the head lice from other children. Although her present husband, Clarence Palmore (hereinafter "Palmore") has never previously been married, he has an illegitimate son. Between the time of Petitioner's divorce from Respondent and her marriage to Palmore, Palmore often spent the weekend at Petitioner's; usually, but not always, on week-

ends when Melanie was not present. On one occasion, Melanie joined Petitioner and Palmore in her mother's bed. On at least one other occasion, Petitioner stayed at another man's residence for the weekend, and displayed a markedly hostile attitude when questioned about the incident. Excerpts from Petitioner's testimony concerning these matters are reprinted as Appendix "B" to this brief.

REASONS FOR DENYING THE WRIT

I. THE JUDGMENTS OF THE FLORIDA COURTS ARE NOT SOLELY BASED ON THE CONSTITUTIONAL QUESTION RAISED BY PETITIONER.

Although Petitioner raises a valid constitutional question, if that question stood alone as the basis for the decisions of the Florida courts, this Court lacks jurisdiction because the record clearly shows that the courts

below did not make their decisions on the constitutional issue raised by Petitioner. The decisions of the Florida courts below rest solely upon principles of Florida family law.

This Court has consistently declined to review judgments of state courts which were based on adequate and independent non-federal grounds, even when a federal question could also be at issue. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1908).

In Florida, as in most states, the "welfare of the child" is the "chief consideration" in fixing or modifying custody decrees. Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975); New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947).

Florida courts also consider the extramarital sexual conduct of a parent which may detrimentally affect the

moral and social development of the child. Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975); Culpepper v. Culpepper, 408 So. 2d 782 (Fla. Dist. Ct. App. 1982).

The District Court's order, in this case, found that there was substantial evidence of changed circumstances so that Melanie's interests would best be served by granting custody to Respondent. (Petitioner for Certiorari, page 27). The fact finding contained in the order referred primarily to Petitioner's extramarital sexual activities. Additionally, the order referenced Melanie's head lice and the fact that Melanie was in a day-care center eight hours per day. Only collaterally did the order reference the pressures of growing up in an interracial household as a factor affecting Melanie's best

interests. Petitioner's entire post-order activities have addressed only the propriety of the trial court's considering racial factors as even a collateral sense.

This Court has no jurisdiction under 28 U.S.C. Section 1247(3) to review state court decisions based on state law. Alton R. R. Co. v. Illinois Commerce Commission, 305 U.S. 548 (1939). A decision of a trial court, if it is correct for any reason, is not to be reversed on appeal even though the trial court may add additional erroneous or insufficient reasons to its decision. Escarra v. Winn Dixie Stores, Inc., 131 So. 2d 493 (Fla. 1961). In custody matters, factual determinations concerning "the best interests of a child" may not be reversed except upon a showing of a clear abuse of discretion. Pinkel v.

Dinkel, 322 So. 2d 22 (Fla. 1975). The primary evidence concerning Melanie's moral and health environment in addition to the possibility of the lack of adequate parental attention by Petitioner was competent and substantial evidence upon which to sustain the Circuit Court's order. There was no reason for the District Court of Appeals to address Petitioner's constitutional claim.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY FEDERAL OR STATE COURT HOLDING PROHIBITING CONSIDERATION OF COMMUNITY, PRIVATE OR GENERAL RACIAL ATTITUDES IN DETERMINING THE BEST INTERESTS OF THE CHILD

Any claim that the Fourteenth Amendment prohibits a state from considering racial attitudes in determining the child's welfare was specifically raised, and rejected, in Drummond v. Fulton County Dept. of

Family and Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Petitioner refers this Court to cases from Pennsylvania and Michigan which dealt with the consideration of racial factors in custody litigation. (Petition for Certiorari, page 18, nn.2&3). It is significant that none of the cited cases was based on the Fourteenth Amendment objection. These cases, at best, illustrate that those states have made policy decisions that race will not be considered a "relevant" factor in considering "best interests of a child." As such, those cases involve state policy matters within family law, not federal constitutional law.

III. ASSUMING PETITIONER'S ARGUMENT, THE FEDERAL QUESTION RAISED IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Even if the record in this case were sufficient to establish that the decision below rested partly upon a federal question, that fact alone does not necessarily create conflict with decisions of this Court.

This case is substantially different from Santosky v. Kramer, 102 S. Ct. 1388 (1982), in that case the state, rather than an individual, initiated the proceedings to deprive a parent of any interest in the child. In this case, they were commenced by Respondent, who, as Melanie's father, has interests in Melanie as fundamental as those of Petitioner. Stanley v. Illinois, 405 U.S. 645 (1972). Santosky is also distinguishable in that the change involved a permanent

termination of parental interests. Petitioner here has been granted visitation rights, and could possibly regain custody of Melanie upon a showing that the child's best interests would be served by the mother regaining possession.

By considering broad general racial attitudes of the anticipated environment of the child, as only one factor among many affecting the best interests of the child, the State of Florida does not seek to punish interracial marriage, as in Loving v. Virginia, 388 U.S. 1 (1967), or interracial cohabitation, as in McLaughlin v. Florida, 379 U.S. 184 (1964).

In acknowledging the realities of contemporary American life, the state of Florida does not necessarily violate the constitutional strictures against racial discrimination. Drummond v.

Fulton County Dept. of Family and Children's Services, 563 F.2d 1200, 1205 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

Furthermore, the recognition that children raised in an interracial household may encounter stresses not imposed upon children in single-race households applies equally to all children and parents, regardless of their races. Petitioner suggests that:

> Judicial concern over the effect of an interracial marriage appears to arise only when the child is white.

(Petition for Certiorari, page 13, n.1). This statement is erroneous to the extent that courts have considered the effect of interracial households on the welfare of black children. See, e.g., Dickson v. Lascaris, 97 Misc. 2d 610, 411 N.Y.S. 2d 995 (Fam. Ct. 1978); In re Matter of R. Children, 89 Misc. 2d 493, 391 N.Y.S. 2d 812 (Fam. Ct.

1977). The fact that two cases, the instant case and Niles v. Niles, 299 So. 2d 162 (Fla. Dist. Ct. App. 1974), involved white children does not indicate that all Florida courts, or even the courts now under scrutiny, intend to apply the racial consideration in a discriminatory manner. The standard as such is facially neutral and equally applicable to all races, and there is no evidence on the record that it was applied in a discriminatory fashion, or is there a showing that the general policy was adopted for discriminatory purposes. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

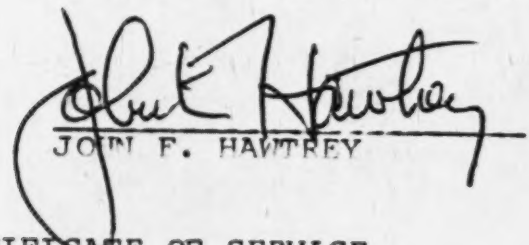
Additionally, if a state court decision could conceivably be based on either state or federal law, this Court should decline review unless the record

affirmatively establishes that a decision of the federal question was necessary; that the federal question was actually decided; and that the judgment, as rendered, could not have been issued without the decision of the federal question. Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934); McGoldrick v. Gulf Oil Corp., 309 U.S. 2 (1940). Petitioner merely surmises from the abstracted quotations as given in his brief that the state courts may have rested their decisions on federal questions. Such a surmise is not sufficient to support a request for review by this Court. Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

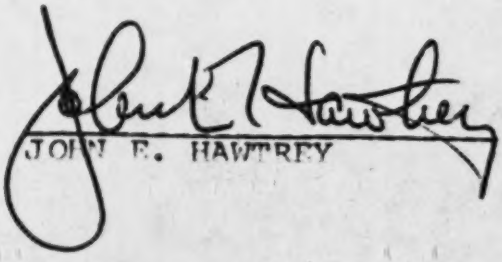
Respectfully submitted,



JOHN F. HAWTREY

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 1983, three copies of the foregoing Respondent's Brief in Oppostion were furnished by mail, correct postage prepaid, to Robert J. Shapiro, Esquire, SPECTOR & SHAPIRO, 201 East Kennedy Boulevard, Suite 924, Tampa, Florida 33602.



JOHN F. HAWTREY

APPENDIX A

[Excerpts from pages 6-8 and 11 of Respondent's testimony.]

[7]

[MR. SIDOTI] . . . There was an incident of when Melanie would be sick, she had an ear infection for a long time. I took her to the doctor on the weekend that I had her and a few times I had even picked her up in the middle of the week and taken her to the doctor for this.

And I have gotten her medication. He has given her eight

[8]

shots and I give her the medication when I have her, but I took the medicine home to Linda to give to her and she never got the medicine, because this problem just keeps going on until Ifinally took it to the day-

care center where they were giving it to her twice a day.

And we took some to Linda where she would give it to her once a day, if she give it to her. That's the only way she got over this infection, was because the day-care center gave it to her twice a day.

* * *

[6]

[MR. SIDOTI] . . . And there was several accounts where she had lice in her hair.

[MR. CARLTON] Did you have to treat her for that?

[MR. SIDOTI] Yes, I treated her for it.

[MR. CARLTON] How many different times?

[MR. SIDOTI] I treated her for it twice and I took her to a doctor the

third time and had him treat her, and get a letter, and affidavit that he saw her and treated her.

* * *

[11]

[MR. CARLTON] Mr. Sidoti, with reference to the head lice, did you call the child or did you call Linda?

[MR. SIDOTI] Yes, i did.

[MR. CARLTON] What response or attitude did she reflect?

[MR. SIDOTI] She was not, didn't seem to be concerned about it. She said she'd had them before.

* * *

APPENDIX B

[Excerpts from pages 8, 11, 14, 18, 19, and 26 of Petitioner's testimony.]

[18]

[MR. SHAPIRO] There wan [sic] an allegation that the child was in bed with you and Mr. Palmore. Could you explain what happened there?

[MRS. PALMORE] This was a weekend that Tony had to work and he called me and said he had to work and said he

[19]

was going to change that weekend to the next weekend because his shift didn't permit it and Clarence only stayed with me. The allegations were that I was living with a black man, he was staying with me on the weekends she was gone. So that she would not be around. This time it just happened he was there and we were taking a nap and

she, as a breastfed child had slept with me for many, many months and at certain times, because of the apartment I had to get, she had to sleep with me before I was married. She woke up, came in, got in bed right against me and when I realized she was in bed with me, I took her back.

* * *

[26]

[CARLTON] Except for Clarence, wasn't there one other black male that stayed there some weekends?

[MRS. PALMORE] No. I stayed at his apartment.

[CARLTON] At Clarence's apartment?

[MRS. PALMORE] No. The other black male you are talking about.

* * *

[8]

[MR. SHAPIRO] Where does she spend her days?

[PALMORE] She spends approximately eight hours in day care, Highway 92, Small World Day Care.

* * *

[11]

THE COURT: How old is his son?

[PALMORE]: Fifteen months.

THE COURT: Is that from a former marriage?

[PALMORE]: No, he was never married.

THE COURT: I see. How old is he?

[PALMORE]: He is twenty-five.

THE COURT: All right. Go ahead.

* * *

[14]

[MR. SHAPIRO] Mr. Sidoti mentioned head lice. Could you describe the occasions on which Melanie

had lice, and what you did about it, how you learned about it?

[MRS. PALMORE] I learned about it from the day-care instructor, Sharon MaDula (phonetic), who when I take her in the morning--we didn't notice any scratching the previous night. That afternoon, I go to pick her up and Sharon would tell me, she has head lice, several of the kids had head lice. You are to treat her or she cannot come to the day care tomorros unless you treat her.

Office-Supreme Court, U.S.
FILED
DEC 9 1983
ALEXANDER L. STEVAS,
CLERK

NO.82-1734

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,

PETITIONER,

v.

ANTHONY J. SIDOTI,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOINT APPENDIX

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Counsel for
Respondent

PETITION FOR CERTIORARI FILED APRIL 23,1983
CERTIORARI GRANTED OCTOBER 17, 1983

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RELEVANT DOCKET ENTRIES

In the Circuit Court of the Thirteenth Jucicial Circuit of the State of Florida, In and For Hillsborough County Docket Number 80-1915

Date	Proceeding
May 29, 1980	Final Judgment of Dissolution of Marriage
September 30, 1981	Petition for Modification of Final Judgment
December 16, 1981	Motion for Social Investigation
December 23, 1981	Order Granting Motion for Social Investigation
February 1, 1982	Final Hearing
February 1, 1982	Respondent's Exhibit #1 - Petitioner's Marriage Certificate
February 10, 1982	Memorandum Stating Objections to Memorandum together with copy of document attached thereto
March 2, 1982	Order on Modification of Final Judgment

RELEVANT DOCKET ENTRIES

In the Circuit Court of the Thirteenth Jucicial Circuit of the State of Florida, In and For Hillsborough County Docket Number 80-1915

Date	Proceeding
March 29, 1982	Notice of Appeal
April 1, 1982	Motion for Stay Pending Appeal
April 13, 1982	Order Denying Stay Pending Appeal
May 5, 1982	Reply to Motion to Review Denial of Motion for Stay Pending Appeal
June 14, 1982	Office of Circuit Court Counselor, Investigative Report

In the District Court of Appeal of Florida, Second District Docket Number 82-739

Date	Proceeding
April 15, 1982	Motion for Review of Denial of Motion for Stay Pending Appeal
April 15, 1982	Memorandum of Law in Support of Motion For Review

In the District Court of Appeal of Florida, Second District Docket Number 82-739

Date	Proceeding
May 13, 1983	Order Granting Motion for Review of Motion for Stay Pending Appeal
June 7, 1982	Initial Brief of Appellant
July 13, 1982	Reply Brief of Appellant (sic)
August 6, 1982	Appellant's Reply Brief
December 8, 1982	Decision Affirming Decision of Circuit Court
December 27, 1982	Motion for Stay Mandate
December 27, 1982	Petition for Rehearing
January 24, 1983	Order Denying Motion for Rehearing and Motion to Stay Mandate

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA, IN AND FOR HILLSBOROUGH COUNTY,
CIVIL ACTION

IN RE: THE MARRIAGE OF:*	
ANTHONY J. SIDOTI,	*CASE NO. 80-1915
Husband,	*DIVISION D
and	*Filed May 29, 1980 Clerk Circuit Court
LINDA A. SIDOTI,	*Hillsborough County Florida
Wife.	*

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

THIS CAUSE COMING before the Court on May 23, 1980 upon Petition for Dissolution of Marriage, and there appearing before the Court the Petitioner, LINDA A. SIDOTI; Petitioner's attorney, THOMAS H. WEISENFELD, ESQ. of the Hillsborough County Legal Aid Bureau, Tampa, Florida; and the Respondent, ANTHONY J. SIDOTI, and the Court having heard the testimony and being

otherwise fully advised in the premises, finds:

1. The Court has jurisdiction of the parties the child and the subject matter herein.

2. One child has been born as a result of the union of the parties hereto, to-wit: MELANIE LYNN SIDOTI, born June 24, 1977.

3. Said minor child is in the care, custody and control of LINDA A. SIDOTI, who is a fit and proper person to have such custody.

4. Respondent, ANTHONY J. SIDOTI, is capable of earning sufficient monies with which to pay a reasonable sum of child support together with medical and dental expenses for the minor child of the parties.

5. The marriage of the parties is irretrievably broken.

It is therefore

ORDERED AND ADJUDGED that:

1. The marriage between LINDA A. SIDOTI and ANTHONY J. SIDOTI is hereby forever dissolved; and the parties and each of them, are hereby free from the bonds of matrimony and the obligations arising therefrom and are awarded a final dissolution of marriage.

2. LINDA A. SIDOTI shall have the permanent care, custody and control of the minor child of the parties, to-wit: MELANIE LYNN SIDOTI, born June 24, 1977, subject to reasonable rights of visitation in favor of ANTHONY J. SIDOTI.

3. ANTHONY J. SIDOTI shall pay to LINDA A. SIDOTI for the support of the minor child of the parties, the sum of $30.00 per week, said sum to be paid

through the Support Department, Clerk of the above styled Court, together with the Clerk's fee therein.

4. ANTHONY J. SIDOTI shall pay all medical and dental bills incurred on behalf of the minor child of the parties.

DONE AND ORDERED at Tampa, Florida this 29th day of May, 1980.

/s/ Morison Buck
CIRCUIT JUDGE

Copies to: Legal Aid Bureau
311 N. Morgan Street
Tampa, Florida 33602

Linda A. Sidoti
1400 Oak Valley Dr.
Seffner, FL 33584

Anthony J. Sidoti
4033 Riverview Dr.
Tampa, FL 33604

Support Department
Clerk of the Circuit Court
Hillsborough County Courthouse
Tampa, Florida 33602

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY, CIVIL ACTION

IN RE: The Marriage of:

ANTHONY J. SIDOTI,	:CASE NO. 80-1915
Petitioner,	:DIVISION D
and	:Filed September 30, 1981
LINDA A. SIDOTI,	:Clerk Circuit Court Hillsborough County,
Respondent.	:Florida

PETITION FOR MODIFICATION OF FINAL JUDGMENT

COMES NOW the Petitioner ANTHONY J. SIDOTI, hereinafter referred to as "Father", by and through his undersigned attorney, and petitions this Honorable Court for modification of the Final Judgment of Dissolution of Marriage entered by this Court on the 29th day of May, 1980, and alleges as follows:

1. That under the terms of the Final

Judgment heretofore entered in this cause, Respondent LINDA A. SIDOTI, hereinafter referred to as "Mother", was given the custody of the minor child of the parties, to-wit: MELANIE LYNN SIDOTI, born June 24, 1977, subject to reasonable rights of visitation in favor of the Father, ANTHONY J. SIDOTI.

2. That since the entry of the Final Judgment the Mother has not provided the minor child of the parties with an environment condusive(sic) to the rearing of a child of such tender age, and certainly has not acted in the best interest and welfare of said minor child in that she has had a black male living with her for some period of time, and may even still be living with her, a fact that she did not try to conceal from the minor child and, in fact, even

permitted the child to be in the same bed with them on different occasions.

3. That the child has on two different occasions had head lice and when the Father brought it to the attention of the Mother, she did nothing to correct the situation, was not even concerned and took the attitude that the child had previously child had previously had head lice and that they had gone away on their own.

4. That the Mother has been negligent in the care of the minor child of the parties in that she has not provided the child with proper nutrition, sends the child to a daycare center in dirty clothes that are mildewed and is not regular as to the time nor manner in which she picks up the child from school.

5. That since the entry of the Final Judgment herein, the Father has remarried

and can provide his minor child with the proper care and love that a child of her tender age needs. Further, that the minor child has developed an affection for the Father's wife and the best interest of the child will be met if custody is given to the Father.

WHEREFORE, Petitioner/Father, ANTHONY J. SIDOTI, respectfully petitions this Honorable Court, after due hearing, to modify the Final Judgment heretofore entered in this cause and award him custody of said minor child.

/s/ROBERT H. CARLTON
1101 E. Jackson Street
Tampa, Florida 33602
(813) 229-6197
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE OMITTED IN PRINTING

Joe A. Rodante
Notary Public
State of Florida
at Large

What therefore God hath joined together, let not man put asunder

St. Matt. 19:6.

God stand beside you on this day of days, that in Healthy, Wealthy, And Happy Wedlock you may live always.

Joe Angelo Rodante

Notary Public State of Florida at Large My Commission Expires December 13, 1984

Filed in evidence as resp's Exhibit #1 this 1st day of February, 1982

s/m. Buck
Circuit Judge

This Certifies

That on the 21st day of November in the year of our Lord

1981

Clarence Palmore Jr.

and

Linda Ann Sidoti

were by me

United in Marriage

at Seffner

County of Hillsborough

according to the ordinance of God an the Laws of Florida

Official Joe A. Rodante

Witnesses E. A. Becker

Angelina Rodante

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION

IN RE: THE MARRIAGE OF:*	
ANTHONY J. SIDOTE,(sic)	*CASE NO. 80-1915
Petitioner/Husband,	*DIVISION D
and	*Filed February 10, 1982
LINDA A. SIDOTI,	*Clerk Circuit Court Hillsborough County
Respondent/Wife.	*Florida

MEMORANDUM STATING OBJECTIONS TO MEMORANDUM OF COURT

Respondent, by and through her undersigned attorney, hereby files this Memorandum in response to the Memorandum written by the court dated February 4 and attached hereto as Exhibit A.

Respondent respectfully submits that the facts in this case are not the same as those in Niles v. Niles, 229 So.2d 162

(Fla. 2nd DCA 1974). In the Niles case there was evidence that the child's behavior had worsened. This is not so in this case. Petitioner has not produced any evidence that the child in the instant case has been adversely affected in any way by the Respondent's conduct.

Furthermore, Respondent submits that deprivation of her child by reason of interracial marriage violates her rights to privacy, equal protection and due process of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article One, Sections 2 and 9 of the Constitution of the State of Florida. Respondent also submits that said deprivation violates her and her husband's right to be free from the badges of slavery

as guaranteed by the Thirteenth Amendment to the United States Constitution.

Respectfully submitted,

/s/ROBERT J. SHAPIRO, ESQ.
300 North Franklin Street
Tampa, Florida 33602
(813) 229-0378

CERTIFICATE OF SERVICE OMITTED IN PRINTING

CHAMBERS OF
CIRCUIT JUDGE
13TH JUDICIAL CIRCUIT OF FLORIDA
COURTHOUSE

TAMPA, FLORIDA 33602

Morison Buck

MEMO

February 4, 1982

TO: Robert J. Carlton, Esq.
Robert J. Shapiro, Esq.

RE: Sidoti v. Sidoti #80-1915

This is a post-judgment proceeding initiated by the father of Melanie Lynn, born June 24, 1977, to obtain custody. Final Judgment rendered May 29, 1980 awarded custody to the mother and reasonable visitation to the father with concomitant support requirements. Both parties have remarried, and there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility of the new spouse of either parent.

EXHIBIT A

Husband's allegations pertaining to a material change in circumstances are that the wife's close association with her present husband, a black male about 10 years her junior, prior to her November 21, 1981 marriage to him, created a bad environment for the child. Secondarily, he says that the child was found with an infestation of head lice on two occasions and with clothing stained by mildew and that those conditions are indicative of some degree of neglect by the custodian/mother.

The mother did not dispute the fact that she was cohabiting with her present husband while a single woman but insists that no sexual activity of any nature ever took place in the presence of Melanie. Mrs. Palmore has custody of a 17 year old son by a previous marriage and the house-

hold consists of herself, her husband, teenage son and Melanie. The latter is in day care for 8 hours daily.

The Court has received the benefit of a home investigative study made by Mr. John C. Knight, Jr., a senior, well trained and experienced member of the Court Counselor serving this Circuit. He is, by sheer coincidence, the same counselor who made a report in a case coming out of this circuit also involving the social consequences of an interracial marriage. Niles v. Niles, 299 So.2d 162. Although there were other elements in Niles not present here, e.g. emotional instability of the mother, there was evidence that the mother entertained men in the home overnight while the children were present. In the present case, the evidence is that the mother did have one

other male friend at the home on an occasion, and that she shared her bed with Mr. Palmore for a period of time before they married. The Court counselor's reasoning is the same as it was in Niles, when he recommended removal of the child from the mother because she "had chosen for herself and therefore for herself and the children), a life style unacceptable to the father of the children and the society in which we live."

The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her

concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

There being substantial competent evidence of changed circumstances and that the best interest of the child will be served, the Court will direct that counsel for husband prepare an Order:

a) Granting the husband's Petition, and divesting the respondent of custody effective immediately.

b) Provide for reasonable visitation on reasonable advance notice.

c) Terminate the present support order and retain jurisdiction for future provisions therefor.

d) Restrict both parties from removing the child from the jurisdiction of the Court without prior Court approval.

e) Require each party to pay his own counsel fees and costs.

/s/Morison Buck

MB:m

Office-Supreme Court, U.S.
FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

NO.82-1734

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,

PETITIONER,

v.

ANTHONY J. SIDOTI,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT A COURT FROM CONSIDERING OR FROM RELYING UPON A SUBSEQUENT INTERRACIAL MARRIAGE OF THE CUSTODIAL PARENT AS A GROUND FOR ORDERING A CHANGE OF CUSTODY.

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ON WRIT OF CERTIORARI TO THE
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SECOND DISTRICT

BRIEF OF PETITIONER

OPINION BELOW

The Circuit Court of the Thirteenth Judicial Circuit of the State of Florida

entered an Order on Modification of Final Judgment on March 1, 1982. [Pet.A. 23]*

The Petitioner timely appealed to the Florida District Court of Appeal, Second District, which affirmed the judgment of the Florida Circuit Court without issuing an opinion on December 8, 1982.[Pet.A.29]

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, Second District was entered on December 8, 1982. Petitioner timely filed a Petition for Rehearing and a Motion to Stay the Mandate with the Second District Court of Appeal in order to permit her to file a Petition for

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*References are to the Appendix to the Petition for Certiorari, e.g., [Pet.A.__]; the Joint Appendix, e.g., [J.A.__]; and to the Record, e.g., [R.__].

Certiorari in this Court. On January 24, 1983 the Second District Court of Appeal denied the Petition for Rehearing and denied the Motion to Stay the Mandate. [Pet.A.30]

The Petition for Writ of Certiorari was filed on April 23, 1983. The Petition for Writ of Certiorari was granted on October 17, 1983.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.§1257(3). Because the Second District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the Second District Court of Appeal is the highest state court in which a decision could be rendered. Fla. Const. Art. V §3(b)(3); Florida Supreme Court Manual of Internal

Operating Procedures, II A1.(a) 396 So. 2d LXXXV; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution reprinted in Appendix D to the Petition for Certiorari. [Pet.A. 31]

STATEMENT OF THE CASE

On May 29, 1980, the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida entered a Final Judgment dissolving the marriage of Petitioner to Respondent and awarding Petitioner custody of Melanie Lynn Sidoti, a child born June 24, 1977. The Circuit Court found that she was a "fit and proper person to have such custody."[J.A. 7]

On September 20, 1981, the Respondent filed a Petition to Modify the Final Judg-

ment in the Circuit Court and sought custody of the minor child. At the time the Petition for Modification of Final Judgment was filed the Petitioner was cohabitating with her fiance Clarence Palmore (now husband) whom she married on November 21, 1981. [J.A.14] [R.54,55,Resp. Ex.1] The Petitioner's household consisted of herself, her fiance (later husband), her seventeen year old son by a previous marriage and the minor child Melanie. [Pet.A. 25]

The Respondent's Petition for Modification alleged that the Petitioner "...certainly has not acted in the best interest and welfare of said minor child in that she has had a black man living with her for some period of time, and may even still be living with her..." and that this had

created a bad environment for the child. [J.A. 11-12] The Respondent also alleged that the child had an infestation of head lice on two occasions and wore clothing stained with mildew and that those conditions were indicative of some degree of neglect by the Petitioner.[J.A. 12]

Following a hearing, on March 1, 1982, the Circuit Court entered an Order on Modification of Final Judgment finding that both parties had remarried and that there was no issue as to either party's devotion to the child, the adequacy of housing facilities or respectability of the new spouse of either parent. [Pet.A.24] [R.12]

The Court found that the Petitioner had brought her fiance into her home and carried on a sexual relationship with him without being married to him and that "such

action tended to place gratification of her own desire ahead of her concern for the child's future welfare." [Pet.A. 26] The Circuit Court also noted that there was evidence that the Petitioner did have one other male friend at the home on an occasion. [Pet.A. 25]

The Circuit Court observed that:

> ...despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vunerable (sic) to peer pressures, suffer from the social stigmatization that is sure to come. [Pet.A. 26-27] [R. 14].

Accordingly, the Circuit Court entered an Order modifying the Final Judgment to award Respondent custody of the child, having found that there was substantial competent evidence of changed circumstances

and that the best interest of the child would be served by awarding custody of the minor child to the Respondent. [Pet.A. 27].

SUMMARY OF ARGUMENT

Sixteen months after the Petitioner was awarded custody of her daughter, the Respondent filed a Petition to Modify Final Judgment seeking custody of the child because, inter alia, Petitioner was cohabiting with a black man, Clarence Palmore, who at the time of the final hearing was her husband.

After a hearing the court found that although there was "...no issue as to either party's devotion to the child, the adequacy of housing facilities or respectibility (sic) of the new spouse of either parent," the child would suffer "social

stigmatization" as a result of the interracial marriage. The Petitioner's interracial marriage was the pivotal, determining, if not the sole factor in the court's decision to take the child from the Petitioner.

Not one scintilla of evidence was introduced to show that the child had been adversely affected by the interracial marriage.

In so ruling, the trial court violated the Petitioner's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Her remarriage was considered by the trial court but the Respondent's remarriage was not considered because he married a white person. The Petitioner's remarriage was used as a basis for predicting "social stigmatization" of the child that would be "sure to come."

This Court's decision in Loving v. Virginia, 388 U.S. 1 (1967) stands for the proposition that a person has a fundamental right to marry a person of another race which cannot be infringed upon by the state. In this case the trial court disqualified the Petitioner from being a custodial parent because of her remarriage to a black man. The court's consideration of her subsequent interracial marriage was an impermissible racial classification which inhibited her freedom to marry a black man without an overriding state purpose to justify the classification.

ARGUMENT

A. Florida law requires a showing of adverse effect on a child prior to ordering a change of custody.

It is important at the outset to place this case in proper context. A trial

court does not have the same degree of discretion in modifying the custody provisions of a judgment of dissolution of marriage as it does in determining custody at the time of the original judgment. Robinson v. Robinson, 333 So.2d 526 (Fla. Dist. Ct. App. 1976). Before the court can change custody, the evidence must show that there has been a substantial change in the conditions of the parties and that the best welfare of the child will be promoted by the court's action. Culpepper v. Culpepper, 408 So.2d 782 (Fla. Dist. Ct. App. 1982).

In order to meet the burden of proving the substantial change of circumstances necessary to justify the modification of custody, the party seeking to modify custody must prove that the child has been

adversely affected by the change of circumstances. Culpepper, supra at 784.

Citing Dinkel v. Dinkel, 322 So.2d 22 (Fla. 1975) the Second District Court of Appeal has stated that "the moral unfitness of a party may be considered in a custody case so long as it has a direct bearing on the welfare of the child." Culpepper v. Culpepper, 408 So.2d 782, 784 (Fla. Dist. Ct. App 1982).

B. The right to marry is a fundamental right.

This Court has long recognized marriage as an important institution in American life. Maynard v. Hill, 125 U.S. 190 (1888). In 1978 the Court stated that the right to marry is fundamental. Zablocki v. Redhail, 434 U.S. 374 (1978). In Santosky v. Kramer, 102 S.Ct. 1388 (1982) this

Court stated that "freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 102 S.Ct. at 1394.

In Stanley v. Illinois, 405 U.S. 645, 651 (1972) this Court stated as follows:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "[r]ights far more precious...than property rights," May v. Anderson, 345 U.S. 528, 533 (1953).... The integrity of the family unit has protection in the Due Process Clause of the Fourteenth Amendment... [and] the Equal Protection clause of the Fourteenth Amendment.... [405 U.S. at 651.]

Against this background, the question presented is whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit a court from considering

or from relying upon a subsequent interracial marriage of the custodial parent as a ground for ordering a change of custody.

C. The freedom to marry a person of another race is protected by the Fourteenth Amendment and cannot be infringed upon by the state.

This Court has repeatedly held that racial classifications are inherently suspect, justified by only the most compelling governmental interest. In McLaughlin v. Florida, 379 U.S. 184 (1964) this Court struck down on equal protection grounds a Florida Statute which made interracial cohabitation of unmarried persons punishable but did not proscribe cohabitation by unmarried persons of the same race. In Loving v. Virginia, 388 U.S. (1967) this Court struck down criminal anti-miscegena-

tion laws in Virginia. In doing so the Court used the following language:

> The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the state. 388 U.S. at 12.

The reasoning behind the Loving case was that the statute in question constituted a restriction of the rights of citizens on account of race. The Court stated that any restriction of the freedom to marry solely because of racial classifications violated the central meaning of the Equal Protection Clause. 388 U.S. at 12.

The other basis of the decision was that the statutes in question deprived the

individuals of liberty without due process of law in violation of the Due Process clause of the Fourteenth Amendment. The Court noted that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man" fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

The Court concluded that to deny this fundamental freedom on the basis of a racial classification embodied in the statute in question is directly subversive to the principle of equality at the heart of the Fourteenth Amendment and deprives citizens of liberty without due process of law. Loving, supra, 388 U.S. at 12.

This Court in Loving held that where a statute draws a classification based on race, the state, in the case of legislation, is required to meet the very heavy burden of showing that the distinction made between interracial marriages and other marriages is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate," and further held that racial classifications are subjected to the "most rigid scrutiny" 388 U.S. at 11.

When a state employs a racial classification, this Court then determines "whether there appears in the relevant materials some overriding [State] purpose" to justify the classification. McLaughlin v. Florida, supra, 379 U.S. at 192. The

classification "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, supra, 388 U.S. at 11. Absent such a showing, "the racial classification ... is reduced to an invidious discrimination forbidden by the Equal Protection Clause." McLaughlin v. Florida, supra, 379 U.S. at 192-93.

More recently, in a dissenting opinion in Fullilove v. Klutznick, 448 U.S. 448 (1980), two members of the Court (Justices Stewart and Rehnquist) stated that its decisional history contains one clear lesson:

> Under our Constitution, the government may never act to the detriment

> of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.... [Id. at 525 (footnote omitted).]

In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1981), this Court, summarizing many of its decisions, stated that "(a) racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification." 442 U.S at 272.

Most recently, in Bob Jones University v. United States, ___U.S.___, 76 L.Ed.2d 157, 51 U.S.L.W. 4592 (1983) this Court held that a private school which prohibited interracial dating and marriage

could not qualify as a tax-exempt organization. Citing Loving and McLaughlin, the Court stated that the decisions of the Court "firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." Bob Jones University, supra, 51 U.S.L.W. at 4602. Therefore it is clear that this Court has long recognized the freedom of a person to marry a person of another race without infringement on that right by the state.

There can be no doubt that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment." Shelly v. Kraemer, 334 U.S. 1, 14 (1948). Therefore, the circuit court judge in

depriving the Petitioner of her child engaged in state action for the purposes of the Fourteenth Amendment. This is further reinforced by holdings of this Court which indicate that a parent has a right to the custody and control of a child. Parham v. J.R., 99 S.Ct. 2493, 2504 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

D. The trial court relied almost exclusively on Petitioner's interracial marriage in ordering the change of custody.

The decision of the trial court in this case to modify the final judgment of dissolution and award custody to the Respondent relied almost exclusively upon Petitioner's interracial marriage and in so doing, violated Petitioner's right to marry a black man.

It is clear from reading the Order on Modification of Final Judgment which is at issue in this case, that the Petitioner's interracial marriage was the pivotal and determining, if not the sole factor in the court's decision to modify the Final Judgment and grant custody of the minor child to the Respondent.

The court recited the allegations found in the Respondent's Petition for Modification. Specifically, in Paragraph 2 of the Petition for Modification of Final Judgment the Respondent alleged that since the entry of the Final Judgment the Petitioner had not provided the minor child with an environment conducive to the rearing of a child of such tender age, and:

> certainly has not acted in the best interests and welfare of said minor

> child in that she has had a black male living with her for some period of time, and may even still be living with her, a fact that she did not try to conceal from the minor child and, in fact, even permitted the child to be in the same bed with them on different occasions. [J.A. 12] [R.1].[1]

The court noted that it had received a home investigation study made by the same court counselor who made a report in the case of Niles v. Niles, 299 So.2d 162 (Fla. Dist. Ct. App. 1974) which was another case coming out of the Thirteenth Judicial Circuit "involving the social consequences

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[1] The court also recited the Husband's allegations in his Petition for Modification that the child had had head lice on two occasions and clothing stained by mildew but since the court did not make any findings of fact regarding these two allegations or any of the other allegations, these allegations can in no way support the Order modifying the Final Judgment.

of an interracial marriage." [Pet.A. 25] [R.13] The social investigation concluded with the following remarks:

> The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society. No parent has the right to commit a child to the uncertainty of adversity beyond the limit of reasonable, calculable risks. There is no question of parent love for child, nor child love for parent. The child, however, is, or at school age will be, subject to environment not of choice. It is recommended custody of the child be awarded to her father. [R.84]

During the trial the Respondent stated that he did not think the minor child should be subjected to the Petitioner's interracial remarriage. He stated that he "felt" the environment that is caused by a mixed marriage was a strain on the child. However, when asked whether he

had ever had his daughter examined by a psychiatrist or psychologist he stated that he had not and that no professional person had indicated to him that the child was suffering some adverse effect as a result of living within the mixed marriage. [Pet.A. 33] [R. 22-23] In fact, during his entire testimony the Respondent did not utter one word or produce any other evidence of any adverse effect that the child had suffered as a result of Petitioner's marriage to Mr. Palmore.

In the Order on Modification of Final Judgment, the trial court stated that the evidence was that the "mother did have one other male friend at the home on an accasion (sic), and that she shared her bed with Mr. Palmore for a period of time before they married." [Pet.A. 25] The court then repeated the court counselor's

reasoning that the wife had chosen for herself and for her children "a life-style unacceptable to the father of the children and the society in which we live." [Pet.A. 25-26] [R. 13]

The court concluded with the following language:

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vunerable(sic) to peer pressures, suffer from the social stigmatization that is sure to come. [Pet.A. 26-27] [R. 13-14]

When these sentences are read together it becomes clear that the wife's subsequent marriage to a black man was the pivotal, determining, if not the sole factor upon which the trial court relied in ordering the change of custody.

The above-quoted passage clearly focuses on the mere fact of the interracial remarriage and the guess of the trial judge that "social stigmatization" of the child will result. The decision, then, rests on a vague fear or speculation about the future welfare of the minor child and nothing else. Such a judicial determination is not sufficient to meet the compelling interest criteria required in the instant case, and "does not constitute a legitimate overriding purpose independent of invidious racial discrimination which justifies this

classification." Loving v. Virginia, supra, 388 U.S. at 11.[2]

E. The trial court considered the Petitioner's remarriage solely because her new husband was black.

The trial court took into consideration the Petitioner's remarriage solely because her new husband was black. Indeed, the trial court stated in its Order of Modification that both parties had remarried suitable spouses. Neither the trial court nor the record offer the slightest suggestion that the wife's husband is unfit. Instead the trial court observed that

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[2] Strickman, "Marriage, Divorce and the Constitution," 22 B.C.L.Rev.935,997 (1981); "Developments in the Law: The Constitution and the Family," 93 Harv. L. Rev. 1156, 1341-42 (1980).

"there is no issue as to either party's devotion to the child, adequacy of housing facilities or respectibility(sic) of the new spouse...", [Pet.A. 24] [R. 12] It is significant that while both parties had remarried, because the husband married a white woman, the trial court said nothing about the impact of his remarriage upon the child.[3]

Thus, the entire proceedings before the trial court, including the Petition for Modification, the social investigation, the trial and the Order on Modification of

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[3] It is noteworthy that while the Petitioner filed a motion for a social investigation of both parties, the trial judge entered an order for a social investigation of only Petitioner's home. (R-4, 6). This is additional evidence of the tainted process which impermissibly burdened the Petitioner because of the race of her husband.

Final Judgment are permeated with the impermissible consideration of the wife's remarriage to a black man. These considerations infected the entire proceedings. There can be no doubt that the thrust and the effect of these proceedings are to punish the Petitioner for her subsequent interracial remarriage by taking her child away from her. Thus, the decision of the trial court runs afoul of this Court's prohibition in Loving that the right to marry a person of another race resides with the individual and cannot be infringed upon by the state. It is hard to imagine more of an infringement by the state than the taking of a mother's child from her.

There is also no doubt that the parenthetical reference to the Petitioner's living with her husband prior to marrying him is inextricably intertwined with the

racial considerations. Standing alone, this off-hand comment by the judge is of no legal consequence and would not support a change of custody absent a showing of adverse effect on the child.[4]

F. The Fourteenth Amendment prohibits a court from considering or from relying upon a subsequent interracial marriage as a ground for ordering a change of custody.

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[4] Petitioner's relationship with her current husband prior to their marriage, is irrelevant under Florida law absent evidence of adverse effect upon the child. Culpepper v. Culpepper, 408 So.2d 782 (Fla. Dist. Ct. App. 1982). (Wife's sexual relationship irrelevant in change of custody proceedings absent evidence and finding of adverse effect upon child). Here no evidence of adverse effect was offered and no finding of adverse effect was made. See also Dinkel v. Dinkel, 332 So.2d 22 (Fla. 1975) (adultery relevant to initial custody determination only when shown to adversely effect the child). Here no allegation of adultery has ever been made.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This amendment embodies our belief that all men are created equal. The trial court's holding that Melanie would suffer "social stigmatization" because of her mother's interracial marriage, bows to the existence of racism as a fact of American life. In so doing, it judicially institutionalizes and sanctions the blight the Fourteenth Amendment was designed to eradicate. No court which is sworn to uphold the constitutionally protected guarantee of equal protection of the laws can issue such a decision.

The decision below stigmatizes Petitioner's new husband because of his race and burdens the Petitioner solely because

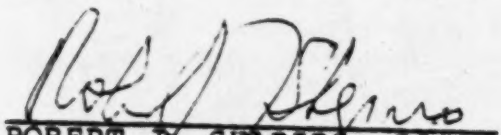
she married him. In short, her interracial marriage has, in effect, disqualified her from being a custodial parent without any justification whatsoever. The decision thus irreconcilably conflicts with the many decisions of this Court interpreting the Equal Protection and Due Process Clauses to prohibit state-sanctioned racial discrimination. In fact, no modern decision of this Court has sustained a racial classification which burdens or stigmatizes black citizens on the basis of race.

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution prohibit a court from considering or relying upon a subsequent interracial marriage of the custodial parent as a ground for ordering a change of custody.

CONCLUSION

The Petitioner seeks an order of this Court reversing and remanding this case to the Second District Court of Appeal with instructions to enter a new order setting aside the Order on Modification of Final Judgment of the Circuit Court of the Thirteenth Judicial Circuit dated March 1, 1982, thus restoring the parties to their original status under the Final Judgment of Dissolution entered by the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida on May 29, 1980.

Respectfully submitted,



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Petitioner,

v.

ANTHONY J. SIDOTI,
Respondent.

On Writ of Certiorari to the District Court of Appeal of the State of Florida for the Second District

BRIEF OF RESPONDENT

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QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT A COURT FROM CONSIDERING OR FROM RELYING UPON A SUBSEQUENT INTERRACIAL MARRIAGE OF THE CUSTODIAL PARENT AS A GROUND FOR ORDERING A CHANGE OF CUSTODY.

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NO. 82-1734

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,
Petitioner,

v.

ANTHONY J. SIDOTI,
Respondent.

On Writ of Certiorari to the District Court of Appeal of the State of Florida for the Second District

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BRIEF OF RESPONDENT

INTERESTS OF PARTIES

Because the Solicitor General of the United States filed in behalf of the mother, Linda Palmore, and because the child is an interested party and the subject matter of this litigation, Respondent has included argument in behalf of the child.

STATEMENT OF FACTS

The Circuit Court of the Thirteenth Judicial District Court of Florida ordered a change of custody from Petitioner to Respondent based on a pivotal finding that the mother's "... action tended to place gratifications of her own desires ahead of her concern for the child's future welfare."[1] Part of the child's future was society's attitude toward interracial remarriages.

SUMMARY OF THE ARGUMENT

Petitioner's cohabitation and subsequent marriage to a person of another race does not automatically move her into a "suspect class" or classification that would warrant judicial scrutiny. The state action complained of is directed at

1. Trial court's Order on Modification of Final Judgment (Pet.A. 25-26)(R.13)

her relationship with her child and not her relationship with her husband. To extend the doctrine of McLaughlin[2] beyond Loving[3] to the relationship that exists in this case would create a "new class" far beyond the present scope of the doctrines governing suspect classes.

If there is any classification in this case, there is a rational relationship between the state interest and the class which would justify such classifications. That relationship is the role of the State as parens patriae in the welfare of the child.

Assuming arguendo that there is a "suspect class" somehow created in this case, the rights of the child are a compelling state interest to be protected by the State of Florida that would justify classification in this instance.

2. 379 U.S. 184 (1964)
3. 388 U.S. 1 (1967)

Loving[4] and McLaughlin[5] can be distinguished as cases classifying relationships between consenting adults, which relationships were improperly prohibited by statute.[6] Here the action complained of is not governed by statute nor is it governmental intervention in actions between consenting adults. It is the discretionary action of a state court in protecting a defenseless child from the arbitrary actions of the parent.[7]

The true test in this cause is whether or not the trial court has improperly classified the parent-child relationship using the "best interests of the

4. Ibid.
5. Supra.
6. Miscegenation statutes such as Virginia's statute prohibiting interracial marriage and Florida's prohibiting interracial cohabitation both assigned criminal conduct and sanctions to the relationship between consenting adults.
7. This is merely the supervision of custodial duties by a court with continuing jurisdiction where the mother is not subjected to any penalty and may regain custody in the same manner as the father obtained it.

child" test. The "best interests of the child" test can be more reasonably stated as the trial court making the least detrimental alternative. Thus the state trial court should and did make its decision based on what would harm the child the least.

The proper party to defend the rights of the child is the state or federal government. The state trial court's action in defense of the child therefore should properly be represented by the Solicitor General. Thus the Solicitor General has chosen to enter this cause in behalf of the wrong client.

ARGUMENT

I. PETITIONER DOES NOT BELONG TO A CLASS OR CLASSIFICATION WARRANTING JUDICIAL SCRUTINY AS A "SUSPECT CLASS."

This case has been incorrectly

assigned to a category of suspect classification similar to interracial marriage. (All opposition briefs[8] extend Loving[9] and McLaughlin.[10]) However, the trial court was correctly looking at the relationship between the mother and child when it first made a finding as to the race of the stepfather,[11] then found that the mother thought only of herself[12] to the detriment of the child and only then

8. It is interesting to note that all amicus briefs, as well as Petitioner's brief, seek to deal with this case as a relationship between procreators (marital situations) rather than procreator and progeny as, for instance, an adoption.
9. Supra.
10. Supra.
11. (Pet.App.26) "The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother."
12. (Pet.App.26) "...Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare." Respondent would note that the Solicitor General struggled to downplay this to demonstrate some sort of racial bigotry on the last page and in the last note of his brief. (Amicus Brief, p.18, note 11).

commented on a major problem[13] that the child would face in the future that would necessitate a sympathetic concerned outgiving on the part of the mother. Perhaps the trial court could have verbalized its holdings in a more complete manner rather than by merely joining them as though they were single thoughts in a single paragraph. To presume a racial bias and then to assign it a status as the "pivotal (and probably the exclusive)..."[14] point of the trial court's order flies in the face of the complete paragraph. Further, it assigns error to an incomplete thought and strains to

13. (Pet.App. 26-27) This Court feels that ... it is inevitable that Melanie will, if allowed to remain in her present situation ... suffer ..." The present situation that the trial court is concerned about is obviously the mother's self gratification which, when related to the future, will result in stigmatization because the mother can not help her child to cope.
14. (Pet.B. p.9,22,27) Although acknowledging other evidence (see: p.21), Petitioner consistently attempts to limit the evidence by use of the word "pivotal" which by its very definition requires that other points be present and would

create a constitutional issue by artificially assigning separate thinking to each part of the single paragraph. It is more credible to designate the paragraph to be the interdependent and integrated thought of the trial court. The class was thus not a mother as one-half of a racially mixed remarriage, but was a mother who demonstrated that she could not relate a racially mixed marriage to her child.

Assuming arguendo that there is a classification as claimed by petitioner in this case, it must be determined if there is a "suspect class."/15 The mere fact

necessitate Petitioner to be clairvoyant to know what the trial court considered to be "pivotal". This case would obviously be much easier for Petitioner if the supposed consideration of race was the only point in question, but, by her own admission, it is not. It would also be easier if the question before the trial court was one relating to the marriage, but it is not. To label this point pivotal does not make it so any more than it would be proper for Respondent to label the sexual self gradification pivotal merely because the trial judge labelled it significant.

15. There seems to be two tests to determine if classification is or is not constitutionally permissible: (1) In cases of ordinary classi-

that the mother is married to a black man does not create a "suspect class."

The only state activity to be scrutinized is the trial court's exercise of its discretion in loco parentis[16] in determining the best interest of a child, which case, such a state activity is a rational relationship between the state and the activity which is classified, if any.[17] However, in this particular case, petitioner asks this Court for review because she claims that the trial court's consideration of her cohabitation with and

fication, it will be permissible if there is a rational relationship between the class and the purpose of the statute or action creating the class; however, (2) if the class being scrutinized relates to a "suspect" class, the state must demonstrate a compelling state interest before the classification can be adjudged constitutionally valid. San Antonio Independent School District v. Rodriquez, 411 U.S. 28 (1973); Harper v. Virginia State Board of Education, 383 U.S. 663(1966); Frontiero v. Richardson, 411 U.S. 677 (1973); Board of Regents v. Roth, 408 U.S. 564 (1971).

16. Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

17. See pages 13-17 and accompanying notes, 31-35.

subsequent marriage to a person of another race is an unconstitutional "suspect" classification.[18]

The class into which the trial court placed her was that of an insensitive mother who just happened to be married to a black man. Thus, it is the relationships between interracial marriage and best interest of the child that must meet the test of unlawful "suspect" classifications, not the interracial marriage.

The criteria for determining if a class is suspect are in part or in whole: (1) the existence of a history of purposeful unequal treatment[19], and/or (2) that membership is a result of an immutable characteristic[20], and/or (3)

18. For some unknown and unexplained reason, by ignoring the court's discretion to consider all matters before it and with a clairvoyent knowledge that these factors are all that the trial court considered, Petitioner and amici isolate a racial issue.
19. San Antonio ISD v. Rodriquez, Supra.
20. Frontiero v. Richardson, Supra.

the presence of a collective violation of a fundamental right protected elsewhere in the Constitution[21]. The Petitioner in this cause is not so classified.

The mother is a member of a number of classes which various court's have from time-to-time dealt with as permissible classifications: she was promiscuous[22]; she was one-half of an interracial marriage[23]; and she may have been neglectful[24]. The record does not reflect, nor does Petitioner's brief indicate, that the existing parent-child relationships have been subjected to a history of purposeful unequal treatment. True, the trial court refers to this type

21. Harper v. Virginia State Board of Education, Supra.
22. Lisenby v. Lisenby, 419 So2d 354 (Florida, 1982), where conduct adversely affects the child.
23. Drummond v. Fulton County Dept. of Family and Children's Services, 563 F2d 1200 (5th Cir. 1977), cert. denied 437 U.S. 910 (1978). An adoption.
24. Moore v. Sims, 442 U.S. 415 (1979) Involuntary removal of an abused child.

marriage as not yet being accepted by society, but that does not, by inference, say anything about the relationship between child and marriage. Given the other factors of insensitivity on the part of the mother, it is as reasonable to infer that the court was referring to this as an isolated case affecting this particular child rather than to all similar cases.

Certainly, the membership in the class as claimed by Petitioner is not the result of an immutable characteristic. The race of this child and this parent are white which is not an immutable characteristic that warrants judicial scrutiny. Only the race of the parent's spouse has changed. Likewise, there is no fundamental right protected elsewhere in the Constitution that is being violated. The state of Florida is protecting the

best interests of the child; that is to say, the child has the right to receive care, control, protection, moral and religious training, reasonable discipline, clothing, food, shelter and education,[25] which the parents collectively have the duty to provide. In protecting these rights, the trial court looked at the testimony of the parties and the court ordered social investigation relative to the parent-child relationship,[26] (the interracial marriage of the mother being

25. Virtually all states provide either in their case law or by statute that the child has a right to all these things. All but five states, Illinois, Massachutsetts, Missippi, Pennsylvania and South Dakota have no fault divorce and thirteen states, including Florida, have exclusively no fault divorce. See: Jane Shey Lych & Sara Lyn Smith's The Women's Guide to legal Rights, Contemporary Books, Inc. (1979). Those facts made it easier for the court's usual attitude toward granting custody to women and support to men; however, the court's discretion is still the primary issue and except for limited and, when presented, isolated instances, is not to be challenged on appeal. Here the Petitioner attempts to strip away all factors but one from the trial court's finding.

26. (Pet.A. p.23)

only a collateral part thereof), as well as the lack of health care[27], lack of hygene[28], lack of appropriate clothes[29] (at times), and immorality[30], not as a classification but as criteria.

Even if this Court should find that the petitioner is of a "suspect class," as to the marriage, the relationship between the right to marry and the privilege of custody is not so classified. The state's interest in the well-being of the child as a whole is a state interest which rationally warrants the classification, if any.

II. THE RATIONAL RELATIONSHIP BETWEEN STATE INTEREST AND CLASS WHICH JUSTIFIES CLASSIFICATION, IF ANY, IS THE ROLE OF THE STATE AS PARENS PATRIAE IN THE WELFARE OF THE CHILD.

Classification, if not a "suspect

27. (Pet.A. p.24)
28. (Pet.A. p.24)
29. (Pet.A. p.24)
30. (Pet.A. pps.24, 25, 26)

class", may be justified by showing a rational relationship between the state interest and the class[31].

The state's interest is grounded in the doctrine of parens patriae[32] upon

31. See pages 7-10 and notes 15, 19-21

32. The concept of parens patriae is certainly not stagnant having evolved from the Roman concept that both child and mother are the property of the man. Given the help of Poet Percy Shelly [Shelly v. Westbrooke, Jacob 266, 37 Eng. Rep. 850 (1817)], modern man by the end of the nineteenth century had lost his firm grip on always getting the children. Based on Luther's timeless philosophy of the womanly role: "Men have broad and large chests and small narrow hips and are more understanding than women who have but small and narrow chests and broad hips, and to the end they should remain home, sit still, keep house and bear and bring up children." (Martin Luther, Table Talk, p. 725), the doctrine evolved into a presumption that mothers should have the children. That notion survived from late in the 1800's to the 1960's. In 1960 a couple ceased to be "one" when married and became "two" when Justice Frankfurter in Dege v. U.S., 364 U.S.51 (1960) found that a wife could be tried separately from her husband. At the same time a scattered group of morality opinions further eroded the motherly presumption with divergent views of a man's right to custody. A Notre Dame scholar (probably following church doctrine) commented "It is not logical to assume that a woman can be a good mother and an adultress at the same time." 24 Notre Dame Law Review 597 (1949). Maryland found a presumption against the mother for such conduct in Hild v. Hild, 221 Md 349 (1960); Arizona

which interest the state may look to the relationships between the role of a parent and the best interests of the child. Courts have looked at and examined many roles and relationships, all of which are, in one form or another, types of classification.[33] The state has a duty to evaluate and, if necessary, to classify the parental role together with all other

showed an enlightened view that if the children were unaware of the mother's conduct, no harm resulted [Grimditch v. Grimditch, 71 Ar 536 (1960)], and Oregon presented the best application in holding that the immorality was merely one of many factors while taking the children from a mother who had her child bring her beer while in bed with her paramore [Strout v. Strout, 224 Ore 52 (1960)].

33. poverty: Harper v Virginia State Board of Education, supra.; religion: Wisconsin v. Yoder, 406 U.S. 205 (1972), In re Green, 448 Pa 338; life style: Palmer v. Barrister, 258 Ia 1390 (1966); age: Raymond v. Cotner, 175 Neb 158 (1963) age and parental rights misconstrued; morality: Gesicki v. Oswald, 366 Fed.Supp. 371 (N.Y. 1971); criminality: Robinson v. California 370 U.S. 660 (1962); homosexuality: Nedler v. Superior Court, 255 Cal.App. 523 (1967); ancestry: Frontiero v. Richardson, supra.; race in adoption: Drummond v. Fulton County Dept. of Family and Children's Services, supra.; intellect (i.e. the mental retarded or

factors relating to care, control, protection, reasonable discipline, clothing, food, shelter, and education.

As Benjamin Cardosa said on parens patriae:

> "The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child. ... He is not adjudicating a controversy between adversary parties to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another ... Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child."/34

chronic drunks); political persuasion (i.e. an antagonist or violent political dissident); health (a chronically ill parent or one having a terminal illness); sex (See: note 32): In keeping with this wide variety of considerations the principal is best summarized by Justice Frankfurter way back in 1940: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" [Tigner v. Texas], 310 U.S. 141, 147 (1940)].

34. Finlay v. Finlay, supra.

The judicial system tends to lump children together with incompetents and drunks to be treated as chattels[35]. Would Petitioner suggest that the State has deprived her of her property without due process of law? The lessons of Lesser v. Lesser as demonstrated in Goldstein and Katy, The Family And The Law, are enough justification for any state to try to prevent the use of a child as a whip by one parent against another. The Judeo-Christian belief in the dignity of man, and in the sacredness of man, and in the integrity of the individual should not have a cut-off point based on age. It is the responsibility of the State to evaluate and, if necessary, to classify.

III. THE RIGHTS OF THE CHILD ARE THE COMPELLING STATE INTEREST TO BE PROTECTED BY THE STATE OF FLORIDA.

35. A "Bill of Rights" for Children, Henry Foster, Jr., Charles C. Thomas, Publisher (1965), at p. 14.

Assuming arguendo that there is a "suspect class" involved in this cause, there is a compelling state interest that would justify the classification[36]. That compelling state interest is to protect the rights of the child for care, control, protection, reasonable discipline, clothing, food, shelter, and education.

Not only is it a compelling state interest, but it is one that is hard to recognize as is most graphically illustrated in the filing of briefs before this Court when the Solicitor General for the United States files a brief on behalf of a parent rather than the child thus showing a shocking lack of understanding as to the state's interest in the child. (See paragraph VI, note 65.)

A threshold question to ask is: at what point does parental behavior begin to

36. See: pages 6-8, notes 15, 19-21 for discussion on tests.

have such an effect upon the interests of the child that the state is compelled to intervene? Along those lines it can further be asked: Where does discipline end and physical abuse begin?/37 Where does affection end and sexual abuse begin?/38 Where does dislike for another end and psychological abuse begin?/39 Where does self interest end and emotional abuse begin?/40 To answer these questions, it must also be asked: Does it take one major incident, event or condition?/41 Will a number of minor incidents, events or conditions suffice?/42 And if so, how many?

Substantively, it may well be impossible and incomprehensible to legislate the rights of children beyond

37. State v. Straight, 347 P2d 482 (Mont. 1959)
38. 73 Yale Law Journal 151 (1963)
39. Application of Mittenthal, 37 Misc. 2d 502 (1962)
40. the instant case
41. Clark, Law of Domestic Relations, (1968) p. 346-348.
42. Application of Mittenthal, supra.

merely saying the best interests of the child. Procedurally, it is almost as hard to judicially determine those rights; yet there is precedent for procedural protections and rights, as in In Re Gault[43], where a delinquent child has the right to counsel in a juvenile proceeding. In In Re Winship[44], a child must be found to have committed delinquent conduct beyond a reasonable doubt, but according to McKeiver v. Penn[45] is not entitled to a jury trial. The child must be given notice and hearing in non-judicial hearings (i.e. expulsion from school) (Goss v. Lopez[46]), yet is not entitled to counsel in commitments by his parents, (Parhan v. J.R.).[47]

43. 387 U.S. 1 (1967)
44. 397 U.S. 358 (1970)
45. 403 U.S. 528 (1970)
46. 419 U.S. 565 (1975)
47. 442 U.S. 584 (1979) Also in removal situations as in Moore v. Sims, 442 U.S. 415 (1979); warrantless searches by welfare workers, Wyman v. James, 400 U.S. 309 (1971); searches by school authorities acting in loco parentis,

Although the trial court did not do so in the instant case, Respondent would urge that in similar cases, a trial court could best protect the child by appointment of a guardian or attorney ad litem.[48] Had the trial court here used the same person to act as guardian ad litem as he used to do the social study and then, by following the request of the ad litem, the results would have been the same but the burden would have been removed from the court.

IV. LOVING AND McLAUGHLIN

Petitioner attempts to extend the doctrines of Loving[49] and McLaughlin[50]

Maxwell v. Stephens, 348 Fed. 325 (8th Cir, 1965); giving a host of rights at a waiver hearing, Kent v. U.S., 383 U.S. 541 (1966); right to treatment, Morales v. Texas, 383 F.Supp. 53 (Tx. 1974).

48. Smith v. Organization of Foster Families, 431 U.S. 816 (1977). Even though this is an adoption case, it should set the precedent for cases such as the instant case where the parental interests are in conflict.

49. Supra.

50. Supra.

to the situation now before the Court. In both referenced cases the state was trying to regulate adult behavior between two consenting adults by statutory prohibitions./51 In the instant case, Petitioner would have this Court believe that the State is trying to penalize her behavior with another consenting adult by judicial action, i.e. coercing her to give up her paramore, later her husband, by taking her daughter./52

Procedurally the state can properly regulate the parent-child relationship in a number of ways, some severe and some quite simple, but all of which are a form of coercing proper parental behavior toward the child. The state can criminally prosecute the parent for abuse or neglect,/53 which abuse and neglect can be emotional and psychological/54 as well

51. See: p. 3, notes 6 and 7.
52. (Pet. B., p. 30)
53. State v. Straight, supra.
54. Foster and Freed, the battered child, Trial, 1967.

as physical; and the state can terminate the parental rights of an offending parent[55] or can merely take temporary custody of the child,[56] which temporary custody can be modified later if the parent changes;[57] and, finally, in the simplest judicial form, the state merely acts as monitor for divorce and change of custody.[58]

If the instant case dealt with a criminal prosecution for emotional or psychological abuse of the child because of the remarriage, the Petitioner's attempts at relating it to Loving and McLaughlin could possibly be understood. Perhaps even a termination action or a

55. In the Matter of Vanderbilt, 245 App.Div. 211 (N.Y. 1935), showing, in part, that even the very rich are subject to abuse and neglect. In Gloria Vanderbilt's case: parental rejection.
56. The so-called "Baby Lemore Cases". People ex rel. Scarpetta v. Spence-Chapin Adoption Service 321 NYS2d 65 (1971) and the companion habeas corpus filed in Florida, 262 So2d 442, cert. denied, 93 S.Ct. 437 (1973).
57. Kovacs v. Brewer 356 U.S. 604 (1958)
58. as in the instant case.

custody action brought by the State could stretch Loving and McLaughlin to a logical conclusion. But to move from statutory restraint by the state through criminal prosecution to monitoring by a domestic relations court pushes either the analysis of either of the referenced cases beyond any reasonable common law application.

If the remarriage stood strictly alone as the only evidence before the trial court[59] and the record was devoid of any other evidence,[60] material,[61] reports or opinions,[62] then Respondent would have to acknowlege that there may have been an unconstitutional classification, not because of impermissible judicial regulation of behavior, but, rather, because of the failure to show a rational relationship between the mother's

59. (Pet.A. p. 23)
60. (Pet.A. p. 24)
61. (Pet.A. p. 23)
62. (Pet.A. p. 23-28)

new relationships and the state's interest, the interests of the child.

V. THE TRUE CLASSIFICATION TEST IS "BEST INTERESTS OF THE CHILD."

If this Court is to establish a general rule as a result of this review, Respondent submits that first, there is never a "suspect class" when dealing with children; permissible constitutional classification may be shown by merely showing a rational relationship between the class and the purpose, i.e. the best interest of the child;[63] and second, if a class question is involved, even remotely, as in this controversy, the state in its role as patriae parens has a duty to

63. Although addressing the phrase "proper parental care," the Court in State v. Metter 5 Fam.Law.Rptr. 2670 (1979) certainly could be defining best interests of a child when it said that the words should be interpreted "... in light of history, culture, generally accepted standards of morality and the common understanding of conscientious and well-intentioned parents."

appoint an ad litem for the children, either a guardian or an attorney. Third, the trial court should look at and apply all the facts to the parent-child relationship in a manner which will have the least detrimental effect on the future of the child.

It is not the interracial marriage that is at question here, it is the mother's total lack of sensitivity to the child's needs. The trial court properly noted[64] the improper dress, the existence and lack of fundamental hygene (head lice), the failure to care and treat the ear infection, and the self gratification of going to or bringing men into the home and correctly projected such lack of sensitivety to the future, i.e. the inability to assist the child in coping with the pressures of the community

64. (Pet.A. p. 23-28)

brought about, not by the child, but by the mother's self gratification, her cohabitation and later interracial marriage.

The trial court took the facts surrounding two essentially similar parents and an innocent child and applied what was the least detrimental approach. The evaluation of the future based on the present created a decision based on what would harm the child the least. The trial court correctly projected the mother's self gratification to a future insensitivity of the child's future problems with race. Thus the trial court's decision follows a logical progression which states: if the mother can not demonstrate that she can cope with accepted morality and hygene, the trial court could <u>not</u> expect her to properly

guide, nurture and protect her daughter from the bigotry generated from her remarriage.

VI. SOLICITOR GENERAL IS REPRESENTING WRONG PARTY.

The State has fifteen or more roles vis-a-vis the parent and a child. It may prosecute a criminal act such as abuse or neglect. The same set of circumstances might result in a civil suit to remove the child permanently from the home or the same circumstances may only result in a temporary removal of the child from the home. If the natural parents are married, the state may look at the circumstances when dissolving the marriage or, if the natural parents are already divorced, then the State may look at the circumstances in a modification of custody. Additionally, the state has an interest in the child in

an adoption, in a juvenile proceeding, in a certification proceeding, in a proceeding to determine if the child is in need of supervision, or if the child is a victim of family violence, whether the child is qualified to act as a witness, and if the child is to be emancipated. Finally, the State has to protect the child in probate, trusts, and inheritence, provide an education, and, if ordered, a home and support.

In no instance does the state have an interest in the marriage of the parent except to divide property and act as parens patriae to the child. In no instance does the state side with one parent against the other.

Respondent objects to the United States Government, by and through the Justice Department, entering this litigation on behalf of one parent against

the other.[65] Respondent submits that the Solicitor General has an obligation only to the child and to the defense of the child's best interests. The trial court's protection of the child should be supported by the state. For the U. S. Government to attack the judgment of the trial court's findings of what is the child's best interest leaves Respondent in the position of both defending the court and his own interests.

CONCLUSION

For the reasons stated above, the decision of the courts below should be affirmed.

Respectfully submitted,

John E. Hawtrey
Attorney for Respondent

January 9, 1984

65. Amicus claims his right to defend the mother under Section 902 of Title IX of the Civil Rights Actof 1964, 42 U.S.C. 2000h-2 "... seeking relief from denial of equal protection ... on account of race [or] color." [Amicus B. p.2] yet overlooks the substantial interest in the Court's resolution of the child's equal protection issue which he should have raised in this case, i.e. the rights of the child in a racially mixed and unsympathetic environment.

No. 82-1734

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE, *Petitioner,*

—v.—

ANTHONY J. SIDOTI, *Respondent.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

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Interest of Amici*

The American Civil Liberties Union is a non-partisan organization of over 250,000 persons dedicated to the enforcement of our constitutional liberties. The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It believes this goal can best be accomplished by helping to eliminate all forms of racial discrimination and to promote the constitutional and civil rights of all Americans. The National Association for the Advancement of Colored People (NAACP) is the nation's largest black civil rights organization. The NAACP is dedicated to the realization of full racial equality and the elimination of racial

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* Letters of consent to the filing of this brief have been obtained from the parties and have been lodged with the Clerk of the Court.

stereotypes which limit the ability of each person to fully actualize his/her human potential and contribution to society.

Much of the struggle for constitutional rights during the past 100 years has centered on the repeated attempts by this Court to eliminate racism as a factor in American law. This case, involving as it does an explicit decision to deprive a mother of the custody of her child merely because she remarried a man of another race, is as flagrant an example of state-enforced racism as has reached this Court in recent years. Accordingly, amici submit this brief in the hope that the Court will find it of assistance in dealing with the persistence of a mode of legal analysis which many had hoped irrevocably banished from our legal system.

Statement of the Case

On May 20, 1980, petitioner, Linda Sidoti Palmore, a white woman, was awarded custody of her three year old daughter, Melanie, pursuant to a Florida divorce decree which found her a "fit and proper person to have such custody." Approximately one year later, Melanie's father, who had since re-married, sought to persuade the Florida courts to award him custody by alleging that petitioner was living with a "black male", whom she married shortly thereafter. The Florida court directed that an investigation be carried out by John C. Knight, Jr., a court counsellor. Mr. Knight, who had in a previous case already recommended that a mother be deprived of custody because she had re-married outside her race,[1] predictably found:

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[1] Mr. Knight was the investigating officer in Niles v. Niles, 299 So.2d 162 (1974), in

> The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society.
>
> No parent has the right to commit a child to the uncertainty of adversity beyond the limit of reasonable, calculable risks.
>
> There is no question of parent love for child, nor child's love for parent. The child, however, is, or at school will be, subject to environmental pressures not of choice.
>
> It is recommended custody of the child be awarded to the father.

Echoing the sentiments of Mr. Knight, a circuit judge for Hillsborough County, Florida, vacated the decree awarding custody to petitioner and, instead, awarded custody to Melanie's father, because in his opinion:

> . . . despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age

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which the Florida District Court of Appeal upheld a change of custody based in large part on an inter-racial remarriage.

> and thus more vulnerable to peer pressure, suffer from the social stigmatization that is sure to come.

The Second District Court of Appeal affirmed without opinion, precluding appeal to the Florida Supreme Court.

The only changed circumstance which led the Florida court to remove Melanie from her mother's custody was petitioner's re-marriage to a black man. This appeal raises the question of whether race may play such a dominant role in a judge's decision to alter an existing custodial decree.

Summary of Argument

1. When a court modifies an existing custodial decree because a white custodial parent has married a black man, it utilizes race as the criterion for judicial decision-making. Such race-dominated adjudication violates an absolute ban on the use of race

as a factor in our law, except in remedial contexts.

2. If race is to play any role in our law at all, it must be justified by a factual showing demonstrating the necessity for its use. No such showing was even attempted in this case.

3. The only justification offered by the court below for removing custody based on an interracial re-marriage was fear of the reaction of bigots in the community. Such surrender to the social blackmail of bigots is constitutionally forbidden.

4. A decision to remove custody as the result of an interracial remarriage impermissibly burdens the constitutional right to marry.

5. The use of a "best interest" standard to overturn an existing custodial decree violates the void-for-vagueness doctrine because it vests uncontrolled discretion in a judge

to interfere with constitutionally protected relationships.

Argument

I. A COURT MAY NOT ALTER AN EXISTING CUSTODIAL DECREE BECAUSE THE CUSTODIAL PARENT ENTERS INTO AN INTERRACIAL MARRIAGE.

When, as here, a court modifies an existing custodial decree because the custodial parent has married outside her or his race, it utilizes race as an operative -- indeed, the controlling -- element in reaching its decision. Such a race-dominated approach to adjudication is unconstitutional on three levels: First, it is contrary to repeated attempts by this Court to prevent race from playing a role in our legal system, except in remedial settings; second, it overlooks the clear teaching of this Court that if race is to play a role in our law, it must be pursuant to a showing of factual necessity; and third, it constitutes a wholly unnecessary surrender to a form of social blackmail imposed by persons in the community who refuse

to accept interracial marriage as acceptable behavior.

A. The Civil War Amendments To The Constitution Absolutely Forbid Race from Playing A Role In Our Legal System, With The Exception Of Remedial Action Deemed Necessary To Correct The Results Of Past Racial Discrimination.

This nation fought a bloody Civil War to free itself from slavery and the legal manifestations of racism. As the first Justice Harlan noted in his prophetic dissent in Plessy v. Ferguson, 163 U.S. 537, 555 (1896), the effect of the 13th, 14th and 15th Amendments was to render the Constitution "color-blind." Had we heeded Justice Harlan's lone voice in Plessy, we would have been spared the anguish of a half-century of racial oppression and would not now be confronted with the question of the extent to which a color-blind Constitution permits, and even requires, race conscious remedial action designed to eliminate the fruits of past

racism. However, with the exception of such race-conscious remedial action -- voluntary or otherwise -- Justice Harlan's vision of a legal system in which race plays absolutely no role is the law of the land. Beginning with Strauder v. West Virginia, 100 U.S. 303 (1880), and Ex parte Virginia, 100 U.S. 339 (1880), this Court has repeatedly sought to exclude race as an element in adjudicating the rights of parties to litigation.[2/] The

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[2/] Race-conscious jury selection was invalidated in Strauder and Ex parte Virginia; race-conscious administration of local law was invalidated in Yick Wo v. Hopkins, 118 U.S. 356 (1886); race-conscious definition of voter qualifications was invalidated in Ex parte Siebold, 100 U.S. 371 (1879); Ex parte Yarborough, 110 U.S. 651 (1884); Guinn v. United States, 238 U.S. 346 (1915); Nixon v. Herndon, 273 U.S. 536 (1927); and Lane v. Wilson, 307 U.S. 268 (1939); race-conscious definition of electoral districts was invalidated in Gomillion v. Lightfoot, 364 U.S. 339 (1960); the enforcement of race-conscious restrictive covenants was invalidated in Shelley v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953); the first Justice Harlan's vision was fulfilled when

clear teaching of this Court is that absent a showing of need for remedial action,[3] our

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race-conscious public school enrollment was invalidated in Brown v. Board of Education, 347 U.S. 483 (1954), and Cooper v. Aaron, 358 U.S. 1 (1958); race-conscious access to public parks and recreational facilities was invalidated in Watson v. Memphis, 373 U.S. 526 (1963); race-conscious seating in courtrooms was invalidated in Johnson v. Virginia, 373 U.S. 61 (1963); race-conscious identification of candidates for political office was invalidated in Anderson v. Martin, 375 U.S. 399 (1964); race-conscious limitations on the ability to marry were invalidated in McLaughlin v. Florida, 379 U.S. 184 (1964) and Loving v. Virginia, 388 U.S. (1967); race-conscious assignment of prisoners was invalidated in Lee v. Washington,. 390 U.S. 333 (1968); race-conscious tampering with the political process to block open-housing legislation was invalidated in Reitman v. Mulkey, 387 U.S. 369 (1967) and Hunter v. Erickson, 393 U.S. 385 (1969); race-conscious enforcement of state trespass laws was invalidated in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); and race-conscious searches and seizures were invalidated in Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975). See also Davis v. Mississippi, 394 U.S. 721 (1969).

[3] The use of race-conscious remedies for past discrimination is discussed in United Jewish Organizations v. Carey, 430 U.S. 144

legal system may not use race as a factor in enacting legislation, in administering existing legislation, or in adjudicating disputes. Yet by depriving Mrs. Palmore of custody of her daughter solely because she remarried a black rather than a white man, the Florida court made race not merely an operative fact, but the sole determinant for its decision. Such race-dominated adjudication cannot be squared with Justice Harlan's vision of a color-blind Constitution. Just as race cannot form the basis for jury selection, voting, re-apportionment, public school enrollment, access to public facilities, marriage, contract law or search and seizure, it cannot be used by a court to alter the custody of a child.

One case stands alone in stark contrast to

(1977); Regents of the State of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers v. Weber, 443 U.S. 193 (1979); and Fullilove v. Klutznick, 448 U.S. 448 (1980).

Justice Harlan's vision of a color blind legal system -- this Court's unfortunate decision in Korematsu v. United States, 323 U.S. 214 (1944).[4] In Korematsu, this Court upheld, over the dissents of Justices Roberts, Murphy and Jackson, the relocation of Japanese Americans living in the Western United States to internment camps during the Second World War.[5] The continued existence of Korematsu as a precedent encourages judges, like the judge below, to believe that race may play a role in their courtrooms. The predictable result of the interaction between Korematsu and local prejudice is the emer-

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[4] See also, Hirabayashi v. United States, 320 U.S. 81 (1943); Ex parte Endo, 323 U.S. 283 (1944).

[5] The United States has consented to a coram nobis petition designed to vacate the Korematsu conviction, without, however, conceding the underlying invalidity of the law. Koramatsu v. United States, 27635 - WMHP (N.D. Cal. 1983).

gence of race as an element in custody proceedings in flagrant violation of the Civil War Amendments. Amici urge the Court to utilize this opportunity to repudiate Korematsu and to make explicit the principle which has animated the jurisprudence of this Court in the modern era: that, apart from necessary remedial programs, race may not, under any circumstances, be a factor in our legal system.

B. If Race Is To Play An Operative Role In Our Legal System, The Justification For Its Use Must Be Demonstrated By A Showing Of Factual Necessity, Which Has Not Even Been Attempted In This Case.

Amici have urged the Court to repudiate the suggestion in Korematsu that race, under extraordinary circumstances, may play a role in our legal system, other than in a remedial sphere. Even under Korematsu, however, Florida's use of race to determine custody can-

not withstand constitutional scrutiny. Justice Black, in his opinion for the Court in Korematsu, recognized the danger of permitting race to play even a limited role in our legal system:

> . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. 323 U.S. at 216.

Thus, even under Korematsu, the use of race as a factor in deciding custody must be subjected "to the most rigid scrutiny" to determine wheteher there is a factual necessity which justifies race-conscious adjudication.

In Korematsu, the claim by military authorities of a threat to national security during wartime was deemed by a majority to provide a sufficient factual predicate for the

internment program. Whatever credence one gives to the Korematsu assessment,[6] if believed, it purported to provide a dramatic factual justification for a race-conscious internment program. No such factual predicate has been offered to justify Florida's adoption of a race-conscious custody program. Instead of factual support, the decision below rests solely on the "undifferentiated apprehension" that children living in a multi-racial home may suffer future harm at the hands of bigots in the community. Not a single fact was considered which might, even arguably, justify the use of race as the dominant factor in the award of custody. No attempt was made to survey the professional literature. No attempt was made to seek the

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[6] Serious allegations have been made that conscious mis-statements of fact were made to this Court in an effort to support the internment decision. Korematsu v. United States, 27635 - WMHP (N.D. Cal. 1983).

testimony of child psychiatrists, child psychologists or trained social workers. No attempt was made to develop a factual record on the impact of interracial marriage on children in general, or on Melanie, in particular. Instead of seeking facts, the court below simply assumed an ugly, stereotypical set of eventualities involving the possible persecution of Melanie by bigots because her stepfather was black. It is, amici believe, a welcome benchmark in our struggle against racism that such an ugly stereotype of reality may not be assumed. If it may be considered at all, it must be proved. Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)

Even more significantly, no attempt was made to deal with the facts pertinent to Melanie herself. The court below simply ignored the fact that petitioner had been deemed the appropriate parent to raise Melanie

scarcely a year earlier and that she had provided her with a loving home. Similarly, the court did not consider the effect on Melanie of removing her from her mother, who had served as custodial parent from birth, and placing her in a new home. The actual harm to a child caused by uprooting her from the only home she has ever known far exceeded the speculative danger that she might someday be taunted by a bigot because her stepfather is black. In short, whether viewed as a general matter or in the particular, no facts whatever were adduced to support a finding that Melanie's custody should turn on the race of her step-father. Cf. Thompson v. City of Louisville, 362 U.S. 199 (1960).

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), five members of the Court considered the extent to which the Constitution permits race to be used in a plan designed to remedy the historic absence

of minority medical students at the University of California. Four members of the Court (Justices Brennan, White, Marshall and Blackmun) approved the use of race in a remedial context because, borrowing the standard of review used in gender discrimination cases, the California plan served important governmental objectives and was substantially related to the achievement of those objectives. Justice Powell, in a separate opinion, subjected the California plan to more stringent scrutiny pursuant to which the use of race must be shown to advance a compelling state interest by the least drastic means. Since, reasoned Justice Powell, the interest in achieving a diverse student body could have been attained by a less drastic plan, the California plan was invalid. However, whatever the disagreement between Justice Brennan and Justice Powell in Bakke concerning the appropriate standard of review, they

agreed that the use of race, even in a remedial context, must be justified by a rigorous factual showing. See also Fullilove v. Klutznick, 448 U.S. 448 (1980). In this case, where race is being used to stigmatize and burden, Florida has not attempted the level of factual justification demanded by Bakke for race-conscious remedial plans. Instead of facts, the Florida court substituted the untutored subjective assumptions of local officials. This Court has never permitted such "undifferentiated apprehension" of future harm to justify government activity in derogation of significant constitutional values. E.g. New York Times Co. v. United States, 403 U.S. 713 (1971); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). Cf. Parham v. J.R., 442 U.S. 584 (1979). Thus, even if one assumes that Florida was not absolutely barred from using race to decide custody, its decision to uti-

lize such a disfavored criterion must be based on an overwhelming factual justification -- and not, as here, on mere subjective speculation.

The Supreme Courts of both Pennsylvania and Michigan have ruled that the race of a custodial parent's spouse may not be a factor in deciding whether to modify a pre-existing custodial decre. Myers v. Myers, 468 Pa. 134, 360 A.2d 587 (1976); Comm'n. ex. rel. Lucas v. Kreischner, 450 Pa. 352, 200 A.2d 243 (1973); Potter v. Potter, 372 Mich. 637, 127 N.W.2d 320 (1964); Edel v. Edel, 97 Mich.App. 266, 293 N.W.2d 792 (1980). See also Kramer v. Kramer, 297 N.W.2d 359 (Iowa 1980). In holding that race cannot be a factor in judicial decision-making, the courts of Pennsylvania and Michigan correctly perceived that both as a matter of law and as a matter of fact, the race of a step-parent is constitutionally irrelevant.

Several courts appear to permit race to be used as a factor, but not the factor, in custody determinations. Russell v. Russell, 399 N.E.2d 212 (Ill. App. Ct. 1979); Niles v. Niles, 299 So.2d 162 (1974). Since the court below viewed race as the determinative factor in its decision to alter custody, it went far beyond any existing authority. Moreover, those courts which seek to permit race to play a limited role in custody cases seek to draw a logically unsupportable line. If, standing alone, non-racial factors would not justify a change in custody, using race as the factor that tips the scales necessarily assigns it a determinative role. If, on the other hand, non-racial factors would justify a change of custody, no basis exists to inject race into the process at all.

C. The Only Justification Offered By The Court Below For Using Race As A Criterion To Determine Custody Is

Fear Of the Activities Of Bigots, Which May Never Found The Basis For Judicial Action.

Amici have argued that no facts were adduced demonstrating a genuine threat to the well-being of petitioner's child merely because she would be raised in an interracial home. Instead, the Court below speculated that persons in the community might torment Melanie when she was of school age and that such a danger justified a change of custody to her father's all-white home. Such speculations, wholly unsupported by facts, can hardly provide a basis for using race as a factor in granting custody. Moreover, in addition to the inherent factual weakness of such speculations, they violate the repeated admonition of this Court that government may not allow itself to be pressured into race-conscious decisions by the reprehensible activities of a small minority of bigots. Thus, in Cooper v. Aaron, 358 U.S. 1 (1958),

when the Little Rock school board sought to postpone integration because public hostility purportedly rendered it impossible to offer a sound educational program with black students in attendance, this Court responded in an extraordinary opinion signed by each of the nine Justices which refused to hold constitutional values hostage to racial bigotry in any form. Similarly, in Watson v. Memphis, 373 U.S. 526 (1963), the threat of adverse reaction by bigots was deemed insufficient to justify a delay in the desegregation of Memphis' parks. Indeed, in Shelley v. Kraemer, 334 U.S. 1 (1948), and Barrows v. Jackson, 346 U.S. 249 (1953), the Court held that judicial enforcement of agreements based on private bigotry constituted state reinforcement of discrimination in violation of the Fourteenth Amendment. Similarly, in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), the Court held that state enforcement of a custom

of discrimination was unconstitutional. See also, Lombard v. Louisiana, 373 U.S. 267 (1963); Bell v. Maryland, 378 U.S. 226 (1964); Commonwealth v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

In allowing its custody decisions to be dictated by fear of the future actions of prejudiced persons in the community, the Florida courts enabled such persons to prevent the enjoyment of constitutional rights. There is little practical difference between a statute forbidding interracial marriage enacted at the behest of bigots and a judicial policy, adopted through fear of bigots, which punishes parents who enter into interracial marriages by depriving them of custody of their children.

D. Depriving A Mother Of The Custody Of Her Child Because She Enters Into An Interracial Marriage Impermissibly Burdens The Fundamental Right to Marriage.

In addition to constituting an impermissible use of race as a criterion for determining custody, the decision to deprive a divorced mother of custody because of an interracial remarriage is an obvious and drastic burden on the exercise of a fundamental right. Since Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942), marriage and procreation have been recognized as fundamental constitutional rights. In Loving v. Virginia, 388 U.S. 1 (1967), this Court invalidated a ban on interracial marriage, stating:

> Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

388 U.S. at 12.

See also, McLaughlin v. Florida, 379 U.S. 184 (1964) (overruling Pace v. Alabama, 106 U.S. 583 (1883)). Finally, in Boddie v. Connecticut, 401 U.S. 371 (1971), this Court

invalidated filing fees in divorce actions by indigents as an unconstitutional impediment to remarriage. If a $60 filing fee for divorce impermissibly burdens the right to remarry, surely a policy which threatens a mother with loss of a child for remarrying outside her race does so as well.

Of course, the right to remarry is not absolute in the context of custody. If a woman chose to marry a homicidal maniac, for example, a change in custody could not be said to infringe her constitutional right to marriage. However, the court below cannot defend its judgment by arguing that it is designed not to punish the mother, but to protect the child. As amici have shown, no factual basis whatever exists for the assumption that being raised in an interracial home creates a risk of harm. Thus, even if, as a matter of theory, the characteristics of the

spouse might be deemed relevant to a custody decision, the constitutionally protected nature of the right to marry further heightens the need for a dramatic factual justification before the remarriage could justify loss of custody. In the absence of such a fact-based justification, the policy of considering an interracial remarriage in determining whether to alter pre-existing custodial arrangements cannot be defended as a means of protecting children. Rather, it is a classic penalty visited on parents who defy local mores by marrying out of their race.

II. THE POWER TO ALTER A PRE-EXISTING CUSTODIAL DECREE BECAUSE A JUDGE DEEMS IT IN THE CHILD'S "BEST INTEREST" VESTS OVERBROAD DISCRETION IN THE COURT.

The court below decided to remove Melanie from her mother's custody and to transfer custody to her father because the court believed that Melanie's "best interests" would not be served by being raised in an interracial household. Amici have argued that the Constitution flatly precludes such race--dominated adjudication. However, the fault for such a decision lies as much with Florida's failure to prescribe objective standards governing change of custody as with the lower court's impermissible use of race as an adjudicatory category. By authorizing judges to decide what is in the "best interests" of the child without providing objective decisional criteria, Florida law invites judges to make purely subjective custody decisions which cannot help but reflect their indivi-

dual social and political views.

When the state acts to alter or terminate an existing custodial relationship it intrudes upon a jealously protected legal relationship. Traditional principles of constitutional law require that whenever the state acts in so sensitive an area, it must follow carefully defined substantive standards. E.g. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974); Colautti v. Franklin, 439 U.S. 379 (1979). One can hardly imagine a standard more violative of the void-for-vagueness doctrine than the wholly conclusory "best interest" standard applied in this case. Devoid of objective meaning, the "best interest" standard is nothing more than a surrender to unbridled discretion and subjective decision-making.

This Court has recognized that the use of such a subjective standard in sensitive areas of constitutional concern violates at least

three significant constitutional policies.

First, such a vague standard fails to provide notice to the potential target of adverse government action. E.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939). Were petitioner to have consulted Florida law prior to her remarriage, she would have found no hint that raising a child in a loving, interracial home was not in the child's "best interests." See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Second, the "best interest" standard "impermissibly delegates basic policy matters to . . . judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, supra; Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972); Connolly v. General Construction Co., 269 U.S. 385 (1926). The wholly conclusory nature of the "best

interest" standard virtually insures the arbitrary, unequal and discriminatory application of the law: arbitrary, in that the standard is purely subjective; unequal, in that the application of the standard will necessarily vary from one judge to another; and discriminatory, in that the standard invites reliance on prejudice and stereotypical thinking.

Third, the "best interest" standard, by vesting judges with virtually uncontrolled discretion, impermissibly delegates policy-making authority in an area of constitutional significance to the judiciary. Where, as here, law impinges on fundamental interests of constitutional significance, classic principles of separation of powers require that policy choices be made by a representative body -- the legislature. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

While reasonable persons will differ as to the degree of precision required of statutes in given contexts,[7] the best interest standard, unaided by any objective criteria, fails to satisfy even the most permissive standard of legislative specificity. Indeed, this Court has repeatedly noted the insuperable vagueness problem posed by the "best interest" standard.

In Smith v. Organization of Foster Fami-

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[7] The best interest standard is utilized in three contexts. In those cases involving state termination of parental rights, the need for specificty and precision is at its greatest. On the other hand, those cases in which the court sets an initial custodial arrangement between the natural parents call for greater flexibility, although not the wholly unrestrained discretion given by a best interest standard. The instant case, involving as it does, an attempt to alter an existing custodial arrangement at the behest of a natural parent, presents a stronger case for specificity than initial custodial arrangements, but a weaker case than termination proceedings. Whatever the variations among contexts, however, the "best interest" standard is too vague for use at any level.

lies, 431 U.S. 816, 835 n.36 (1977) the Court recognized that "judges . . . may find it difficult, in utilizing vague standards like 'the best interest of the child' to avoid decisions based on subjective values."

In Bellotti v. Baird, 443 U.S. 622, 655-56 (1979), four members of the Court (Justices Brennan, Marshall, Blackmun and Stevens) noted that a "best interest standard

> ... provides little real guidance to the judge . . . (whose) decision must necessarily reflect personal and societal values and mores whose enforcement is fundamentally at odds with privacy interests.

In Santosky v. Kramer, 455 U.S. 745, 752 (1982), the Court noted that vague standards give family court judges "unusual discretion to underweigh probative facts that might favor the parent."[8/]

8/ The Court has granted review in three recent cases challenging the vagueness inherent in an unadorned "best interest"

Since the "best interest" standard violates all three policies advanced by the void-for-vagueness doctrine, this Court should require articulation of more precise standards in custody settings by invalidating Florida's use of an unadorned best interest

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standard. In Doe and Roe v. Delaware, prob. jur. noted, 445 U.S. 942 (1980), app. dism. for want of a properly presented federal question, 450 U.S. 382 (1981), the Delaware Supreme Court invalidated the best interest standard, but affirmed the termination on alternative state grounds. In Johnson v. J.O.L., cert. granted 449 U.S. 818 (1980), judgment vacated and remanded, 449 U.S. 989 (1980), a decision upholding a "best interest" termination became moot prior to judgment. Finally, in Kirkpatrick v. Christian Homes of Abilene, cert. granted 459 U.S. _____ (1983), vacated and remanded 460 U.S. _____ (1983), a challenge to the best interest standard was vacated after a representation that relief was available under Texas law.

Lower courts have consistently invalidated the "best interest" standard. E.g. Alsager v. District Court of Polk County, 406 F.Supp. 10, 17-18 (S.D. Iowa 1975) aff'd on other grounds 545 F.2d 1136 (8th Cir. 1976); Roe v. Conn., 417 F.Supp. 769, 780 (M.D. Ala. 1976); In re Five Minor Children, 407 A.2d 198, 199 (Del. 1978); Davis v. Smith, 583 S.W.2d 37 (Ark. 1979); Linn v. Linn, 286 N.W.2d 765 (Neb. 1980).

standard to alter a pre-existing custodial decree.

Conclusion

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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No. 82-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,
Petitioner,

v.

ANTHONY J. SIDOTI,
Respondent.

On Appeal from the District Court of Appeal of the State of Florida for the Second District

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, Ms. Leigh Earls, the Washington Lawyers' Committee for Civil Rights Under Law, the Children's Defense Fund, the Anti-Defamation League of B'nai B'rith and the American Jewish Congress ("*amici*") respectfully request leave to file a brief *amici curiae* in support of the petitioner, Linda Sidoti Palmore. This motion is filed because *amici* have been unable to obtain the written consent of both parties.[1]

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[1] The letters received from counsel for the parties have been lodged with the Clerk.

Amici wish to address the question whether the Equal Protection Clause of the Fourteenth Amendment prohibits a State court from considering or relying upon a subsequent interracial marriage by a natural (custodial) parent as a ground for ordering a change of custody. The interests of *amici* are as follows.

Leigh Earls, a white child who has been raised in an interracial home over the last twelve years, may be adversely affected if the action of the Florida courts is sustained. If courts are permitted to presume, as the Florida courts did, that an interracial home is detrimental to the interests of a white child, she could be taken from her current home. She believes, based on her personal experience, that courts should not be permitted to employ such a presumption. *See* Appendix to the accompanying Brief *Amici Curiae.*

The Lawyers' Committee for Civil Rights Under Law and its Washington, D.C. affiliate have long provided volunteer legal representation in judicial, administrative and legislative proceedings in an attempt to vindicate the constitutional rights of aggrieved persons. The interest of the Washington Lawyers' Committee in this case arises from its commitment to eliminating all forms of unlawful discrimination, ensuring equal protection of the laws and protecting the interests of children.

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of children, particularly low-income, minority, and handicapped children, and their families. The Children's Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. The Children's Defense Fund is committed to the proposition that children will benefit immeasurably from the elimination of discrimination and the fair and equal application of our laws.

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest public service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion. Among its many other activities directed to these ends, the Anti-Defamation League has been an active *amicus* participant in this Court.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has filed numerous *amicus* briefs in this Court seeking vindication of the rights of all Americans to full equality regardless of race or religion.

The decision of this Court will have implications extending far beyond the parties before it and will determine whether the courts of this Nation may lawfully control the makeup of families on the basis of racial classifications. In light of these widespread implications, *amici* believe that this Court should have the broadest possible perspective on the question presented. To that end, *amicus* Earls provides the viewpoint of a sixteen year old child who has had firsthand experience in living in an interracial home over the last twelve years. The Washington Lawyers' Committee and the Children's Defense Fund present the perspective of organizations with a firm commitment to ensuring equal protection of our laws and protecting the interests of children. The Anti-

Defamation League and the American Jewish Congress bring to bear a longstanding commitment to protecting the civil rights of all persons. *Amici* believe that State courts in change of custody proceedings should never be permitted to presume that interracial homes are unfit, to use the existence of prejudice in our society as an excuse for employing otherwise offensive racial classifications or to consider race as a relevant factor. These positions and others are set forth in detail in the accompanying brief *amici curiae*.

Respectfully submitted,

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Dated: December 6, 1983

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BRIEF *AMICI CURIAE* OF LEIGH EARLS, THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE CHILDREN'S DEFENSE FUND, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS

Ms. Leigh Earls, the Washington Lawyers' Committee for Civil Rights Under Law, the Children's Defense Fund, the Anti-Defamation League of B'nai B'rith and the American Jewish Congress submit this brief *amici curiae* in support of the position of petitioner, Linda Sidoti Palmore. *Amici* will address the question whether the Equal Protection Clause of the Fourteenth Amendment

prohibits a State court from considering or relying upon a subsequent interracial marriage by a natural (custodial) parent as a ground for ordering a change of custody.

INTERESTS OF THE *AMICI CURIAE*

Ms. Leigh Earls, a white child being raised in an interracial home, may be adversely affected if the action of the Florida courts is sustained. If the courts of this Nation are permitted to presume that an interracial home is detrimental to the interests of a white child, she could be taken from her current home. After reading a newspaper article regarding the grant of a writ of certiorari in this case, she composed a letter to this Court, expressing her view that courts should not be permitted to employ such a presumption. The text of the letter is reprinted in the Appendix hereto.[1]

Leigh Earls has been raised by her mother (who is white) and her stepfather (who is black) for over twelve years. During that period, she has lived in various locations (Boston, London, and St. Louis) and attended both public and private schools. In these varied settings, her stepfather's ("dad's") race has not been a significant issue. Her letter states:

> After being raised in an interracial home for over twelve years, I can say that my dad's race makes absolutely no difference to me. Although I worried about it from time to time, I now know that it was always an easy thing to handle. If people were going to judge me by the race of the man my mother chose to marry, I would not have cared to have their friendship, and there probably would have been something else to cause them to dislike me sooner or later.
>
> But of far greater importance is the fact that I have been raised over the last twelve years in a

[1] The signed original of the letter has been lodged with the Clerk.

> happy and stable home. I am fortunate to have had a close and loving relationship with my mom, dad and sister. My home has prepared me to deal with any prejudice that I might have encountered and to recognize that people should not be prejudged. My personal experience has made me a more tolerant, sympathetic and understanding person, qualities which I hope to retain for a lifetime. [Appendix at 5a-6a.]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of President John F. Kennedy, to involve private attorneys in a national effort to ensure equal rights for all members of our society. The Lawyers' Committee and its Washington, D.C. affiliate have long provided volunteer legal representation in judicial, administrative and legislative proceedings in an attempt to vindicate the constitutional rights of aggrieved persons. Such representation has often involved *amicus* participation in matters before this Court. The interest of the Washington Lawyers' Committee in this case arises from its longstanding commitment to eliminating discrimination, ensuring equal protection of the laws and protecting the interests of children. In recent years, it has twice participated in matters before the Court in which the rights of children were at stake. *See Plyler* v. *Doe*, 457 U.S. 202 (1982); *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of children, particularly low-income, minority, and handicapped children, and their families. The Children's Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. The Children's Defense Fund is committed to the proposition that children will benefit immeasurably from the elimination of discrimination and the equal and fair application of our laws.

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The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has filed numerous *amicus* briefs in this Court seeking vindication of the rights of all Americans to full equality regardless of race or religion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a change of custody proceeding in which the child's natural parents have both remarried. The trial court (the Circuit Court for the Thirteenth

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[2] *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Comm'n* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.*, 427 U.S. 273 (1976); *Bob Jones University* v. *United States*, 51 U.S.L.W. 4593 (May 24, 1983).

Judicial Circuit) found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility [*sic*] of the new spouse of either parent." [3] A pivotal, if not the sole, factor cited by the trial court for revoking petitioner's custody over her daughter (Melanie) was petitioner's remarriage to a black man and the trial court's

> feel[ing] that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from a social stigmatization that is sure to come. [Pet. App. A, ¶ 5.]

The trial court concluded that there was "substantial competent evidence of changed circumstances and that the best interest of the child will be served by awarding custody of the minor child to the father . . . ." *Id.*, ¶ 6. On appeal, the District Court of Appeal of the State of Florida, Second District, affirmed the judgment of the trial court without issuing an opinion. Pet. App. B.

It is important at the outset to place this case in proper context. The case concerns a change of custody determination. To order a change of custody in the Florida courts, "the evidence must show that there has been a substantial change in the condition of the parties and that the best welfare of the child will be promoted by the court's action." *Culpepper* v. *Culpepper*, 408 So.2d 782, 784 (Fla. Dist. Ct. App. 1982). The substantial change in circumstances must have "a direct bearing on the welfare of the child." *Id.* In the *Culpepper* case, "the only change of real consequence occurred when Mrs. Culpepper had an illegitimate child." *Id.* The appellate court reversed the trial court's order changing custody to the father, finding that "[t]here is no evidence that

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[3] Order of Modification of Final Judgment, dated March 1, 1982, Pet. App. A, ¶ 1.

[the child] has been adversely affected in any way by Mrs. Culpepper's conduct." *Id.* at 785.

The instant case also involves the integrity of a family. This Court "has frequently emphasized the importance of the family," *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972):

> The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). . . . The integrity of the family unit has protection in the Due Process Clause of the Fourteenth Amendment . . . [and] the Equal Protection Clause of the Fourteenth Amendment . . . . [405 U.S. at 651.]

The Court has recognized "that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Id.*, *quoting from Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). *See also Smith* v. *Organization of Foster Families*, 431 U.S. 816, 842-847, 862-63 (1977). The Court has likewise treated the right to marry as a fundamental civil right. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 383-87 (1978).

Against this background, the question presented is whether the State courts of Florida may use a subsequent interracial marriage as a ground for revoking petitioner's custody of her daughter. We submit that they may not.

1. Racial classifications are inherently suspect and subject to the most rigid scrutiny. When a State employs a racial classification, the Court must determine

whether the State has shown a compelling interest to justify that classification.

2. The trial court unquestionably employed a racial classification. It used petitioner's remarriage to a black man as a ground for revoking custody. It did so because of the color of his skin, not because of his personal qualities, education or devotion to the child. Just as a State may not lawfully punish a white woman and a black man for marrying, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), it may not lawfully use such a marriage as the basis for revoking the woman's custody of her child.

3. The only reason offered by the trial court for using the stepfather's race as a determining factor was its speculation that the child would be socially stigmatized. The mere existence of prejudice in our society, however, does not provide a compelling justification for a State to employ a racial classification. A State court should never yield to prejudice and should not be permitted to use it as an excuse to employ an otherwise offensive racial classification. Nor should it be permitted, under the pretense of avoiding the stigmatization of one person (the white child), to stigmatize others (the black stepfather, as well as other blacks and families with parents of different races).

4. A subsequent interracial marriage should never be a ground for ordering a change of custody. The State's only legitimate interest is in determining whether there has been a significant change in circumstances and what is in the best interest and welfare of the child. There is no reason why those determinations cannot be made without regard to the race of family members. Use of a racial classification, therefore, is not "necessary" to a compelling State interest and is constitutionally invalid. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11.

5. At an absolute minimum, no State court should be permitted to use race as a factor in a change of custody proceeding unless such court finds (i) that it is not

possible to resolve the best interest of the child on racially-neutral terms, (ii) that consideration of race is necessary to a compelling State interest, and (iii) that clear and convincing evidence exists in the record to demonstrate why race is a necessary and relevant consideration in the particular case before it.

ARGUMENT

I. THE FLORIDA COURTS HAVE UNLAWFULLY EMPLOYED A RACIAL CLASSIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Applicable Standards

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." State courts and judicial officers, like State legislatures, are subject to that command. "[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials." *Shelley* v. *Kraemer*, 334 U.S. 1, 18 (1948).

It is equally well settled that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia*, *supra*, 388 U.S. at 10. Recognition of that purpose has rendered racial classifications "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and has subjected them to the "most rigid scrutiny." *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). It has also resulted in the invalidation of numerous racial classifications. *See, e.g., Loving* v. *Virginia*, *supra*, 388 U.S. at 12 (prohibition against interracial marriage); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964) (prohibition against

interracial cohabitation); *Tancil* v. *Woolls*, 379 U.S. 19 (1964) (*per curiam*) (designation of race in voting and property records); *Anderson* v. *Martin*, 375 U.S. 399 (1963) (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis*, 373 U.S. 526 (1962) (segregation in public parks and playgrounds); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (segregation of public schools).

A racial classification will pass constitutional muster only if shown to advance a governmental interest that is "compelling," *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972), *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971), or "overriding." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11; *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192. The classification must also be shown to be "necessary" to, *Loving* v. *Virginia*, *supra*, 388 U.S. at 11, and "precisely tailored to serve[,] a compelling governmental interest." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982). Absent such a showing, "the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.

B. The Trial Court Employed a Racial Classification, and There Is No Compelling State Interest to Sustain That Classification

The trial court employed a racial classification that is constitutionally suspect and subject to the most rigid scrutiny. The trial court used the petitioner's remarriage to a black man as a pivotal ground for revoking petitioner's custody. The trial court found that it would be detrimental to the white child's interest to be raised by a black stepfather because "it is inevitable that Melanie will . . . suffer from a social stigmatization that is sure to come." Pet. App. A, ¶ 5. It did not find that the black stepfather was unfit. To the contrary, it specifically found that both natural parents had remarried

and that there was no issue as to the devotion to the child, the adequacy of housing or the respectability of the new spouses. *Id.*, ¶ 1.

At bottom, therefore, the stepfather's race, not his personal qualities, education or devotion to the child, was the disqualifying factor. The use of this racial classification, *inter alia*, punishes and stigmatizes petitioner and her new husband for exercising their right to marry and denies petitioner and her child the right to an unprejudiced change of custody determination.

This Court has invalidated racial classifications in closely analogous circumstances. In *McLaughlin* v. *Florida*, *supra*, it struck down a criminal statute making cohabitation by interracial couples unlawful. It held that Florida's exercise of State police power "trenches upon the constitutionally protected freedom from invidious official discrimination based on race." 379 U.S. at 196. Such a law "bears a heavy burden of justification" and "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *Id.* In *Loving* v. *Virginia*, *supra*, the Court similarly invalidated a State law proscribing interracial marriages:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. [388 U.S. at 11-12.]

This case is simply a sequel to *McLaughlin* and *Loving*. Here the trial court has used petitioner's remarriage to a black man as a basis for revoking petitioner's custody of her child. "There is patently no legitimate overriding purpose independent of invidious racial discrimination

which justifies this classification." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11. Just as a State may not lawfully punish a white woman and a black man for marrying, it may not lawfully revoke the woman's custody of her child because of that marriage. Otherwise, the State could do indirectly that which this Court has said it could not do directly—punish individuals because of interracial marriages.

Nor is there a compelling State interest to sustain the trial court's action. The only reason offered by the trial court for its use of the stepfather's race as a determining factor was its speculation that the child would be socially stigmatized. But as a number of State courts have recognized, speculation about prejudice in our society cannot be used to control the makeup of families.

For example, in *In re Marriage of Kramer*, 297 N.W. 2d 359, 361 (Iowa 1980), the Supreme Court of Iowa "emphatically reject[ed] the idea that parent child relationships are to be dictated by unsubstantiated judicial predictions concerning the effects of racial prejudice in the community. Community prejudice, even when shown to exist, cannot be permitted to control the makeup of families." In *Commonwealth ex rel. Lucas* v. *Kreischer*, 450 Pa. 352, 299 A.2d 243 (1973), the Supreme Court of Pennsylvania, reaching the same result, recognized that

> "in a multiracial society such as ours racial prejudice and tension are inevitable. If . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such." [299 A.2d at 246 (quoting, with approval, lower court dissent).]

See also Beazley v. *Davis*, 92 Nev. 81, 545 P.2d 206 (1976); *Myers* v. *Myers*, 468 Pa. 134, 360 A.2d 587 (1976); *Edel* v. *Edel*, 97 Mich. App. 266, 293 N.W.2d

792 (1980); *In re H.*, 37 Ohio Misc. 123, 305 N.E.2d 815 (1973).

The Superior Court of Pennsylvania recently ruled that concerns about prejudice do not make race a relevant factor and that the trial court's consideration of race was an error "of the most serious dimension." *In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d 111, 120 (1982). The court stated:

> A court may not assume that because children will encounter prejudice in one parent's custody, their best interests will be served by giving them to the other parent. If the children are taunted and hurt because they live with a black man, with love and help they may surmount their hurt and grow up strong and decent—the sort of children any parent would be proud of. . . . [450 A.2d at 120 (citations omitted).]

The court emphasized that "a court must never *yield* to prejudice because it cannot *prevent* prejudice." *Id.* (emphasis in original). "A court should declare the law" and "should always exemplify" a "fundamental principle of our law . . . that all persons are created equal." *Id.* *See also DeLander* v. *DeLander*, 37 U.S.L.W. 2139 (Calif. Super. Ct. 1968) ("While the Constitution cannot prevent bigotry, it can prevent an individual from involving the State, through its Courts, in such bigotry.").

It cannot be denied, of course, that racial prejudice exists in our society. That fact, however, does not provide a compelling justification for a State to employ a racial classification, thereby reinforcing and perpetuating such prejudice. A State court should never surrender to prejudice and should not be permitted to throw the power of the State behind it. Any other result, we submit, would legitimize offensive racial classifications and would seriously undermine the central purpose of the Fourteenth Amendment. It would also permit the State, under the pretense of avoiding the stigmatization of one person

(the white child), to stigmatize others (the black stepfather, as well as other blacks and families with parents of different races). *Cf. Brown* v. *Board of Education*, *supra*, 347 U.S. at 494. It would further permit the State to deny petitioner and her child the right to "an unprejudiced hearing focused solely on an inquiry into what custody order would be in [the child's] best interest and welfare." *Beazley* v. *Davis*, *supra*, 545 P.2d at 208.

In short, the trial court's speculative concern about "social stigmatization" fails to provide the compelling State interest that is required to sustain a racial classification. In the absence of any other articulated State interest, "the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.

II. A SUBSEQUENT INTERRACIAL MARRIAGE SHOULD NEVER BE A GROUND FOR ORDERING A CHANGE OF CUSTODY

The question presented for review by petitioner is whether the Equal Protection Clause prohibits a court from considering or relying upon a subsequent interracial marriage as a ground for ordering a change of custody. We have already shown that such a prohibition applies to the action taken by the trial court in this case. Nonetheless, because it is possible that this Court might consider, in the context of a remand for further proceedings, whether race may ever be a ground for ordering a change of custody, *amici* wish to address that broader question.

As we have already shown, racial classifications are inherently suspect and presumptively invalid. "[I]f they are ever to be upheld, they must be shown to be *necessary* to the accomplishment of some permissible state objective, independent of racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11 (em-

phasis added). We are unaware of any decision of this Court that would permit a State to penalize a person (*e.g.*, revoke a mother's custody of her child) based on a racial classification. Indeed, in *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 198, two members of the Court (Justices Stewart and Douglas) stated in a concurring opinion that they could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." *See also Loving* v. *Virginia*, *supra*, 388 U.S. at 19 (Stewart, J., concurring). More recently, in a dissenting opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), two members of the Court (Justices Stewart and Rehnquist) stated that its decisional

> history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. . . . [*Id.* at 525 (footnote omitted).]

In a change of custody case, the only legitimate interest of the Florida courts is whether there has been a "substantial change in the condition of the parties" that has "a direct bearing on the welfare of the child." *Culpepper* v. *Culpepper*, *supra*, 408 So.2d at 784. But those issues can and must be resolved without regard to race. The fitness of the home and of the individuals as parents should be the controlling factors. There is no reason why such fitness cannot be judged on racially-neutral terms. And "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [petitioner in this case] is a fit [mother], the State spites its own articulated goals when

it needlessly separates [her] from [her daughter]." *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652-53.[4]

The modern trend of State court authority recognizes that race is not an appropriate consideration in a custody dispute. In *Beazley* v. *Davis*, *supra*, for example, the Supreme Court of Nevada reversed a trial court ruling that two children of a mixed marriage should remain in the custody of their black father because of their physicial characteristics. It held that the trial court improperly "restricted the right of the natural mother to be considered as the proper parent to have custody of her children" and "the children . . . were denied the benefit of an unprejudiced hearing focused solely on an inquiry into what custody order would be in their best interest and welfare." 545 P.2d at 208.

The Supreme Court of Pennsylvania has likewise recognized that race is not a relevant factor in a custody determination. In *Commonwealth ex rel. Lucas* v. *Kreischer*, *supra*, the Court considered whether a white mother's subsequent interracial marriage was a proper ground for revoking custody over her daughter. The Court ruled that it was not. 299 A.2d at 245-46. That ruling was reaffirmed in a similar factual context in

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[4] This Court is not presented with, and need not consider, whether race may play a role in a noncustody context (*e.g.*, an adoption case). But we wish to note for the record that the competing interests in a change of custody dispute differ sharply from the competing interests in an adoption context or in the context of other placements by the State (*e.g.*, foster care). In change of custody cases, the parties are most often, as here, natural parents, and the State is mediating a dispute between them. In adoption cases, by contrast, State and local instrumentalities confer parental rights upon individuals who lacked preexisting parental rights in the children adopted. *See, e.g., Drummond* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978). As a consequence, in adoption or other governmental placement cases, the nature of the process and the private and governmental interests at stake are quite different. *See* 563 F.2d at 1204-11.

Myers v. *Myers*, *supra*, 360 A.2d at 591-92. In the recent case of *In re Custody of Temos*, *supra*, 450 A.2d at 120, the Superior Court of Pennsylvania stated in unequivocal terms:

> In a child custody case, race is not a "consideration," or "concern," or "factor." Questions about race are in no respect "appropriate." In stating that race "ought to be" a consideration, the lower court was fundamentally mistaken.

See also In re Marriage of Kramer, *supra*, 297 N.W.2d at 362 ("Sandi's relationship with her [black] male friend . . . has no bearing on [the] issue" of "the emotional and moral welfare of her children."); *Edel* v. *Edel*, *supra*, 298 N.W.2d at 796 ("The circuit court should redetermine Kristen's custody without reference to the race of the plaintiff's fiance."); *In re H.*, *supra*, 305 N.E.2d at 819 ("Certainly then Carol's marriage to a black man is of no significance in this case and does not support the neglect complaint."); *DeLander* v. *DeLander*, *supra*, 37 U.S.L.W. at 2139 ("[A]ny consideration of the stepfather's race, or of the race of the mother's associations, or of the neighborhood racial mix, would result in a Court making its determination on the basis of factors which the Fourteenth Amendment prohibits from consideration.").[5]

As these modern decisions recognize, a subsequent interracial marriage or relationship has no bearing on the critical issue in a custody dispute—the best interest of

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[5] There are other cases that have used race as a controlling factor or have stated that it may be a consideration. Many of those cases, however, predate this Court's more significant rulings under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Ward* v. *Ward*, 36 Wash. 2d 143, 216 P.2d 755 (1950); *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956). Some of these earlier cases have been reconsidered in more recent decisions. *See, e.g., Tucker* v. *Tucker*, 14 Wash. App. 545, 542 P.2d 789, 791 (1975); *Stingley* v. *Wesch*, 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966). *See generally* Annot., 10 A.L.R. 4th 796 (1981).

the child. That issue can be resolved, without regard to race, on the basis of the fitness of the parents occupying the respective homes. Use of a racial classification, therefore, cannot be shown to be "necessary" to a compelling State interest and is unlawful. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11.

If this Court nevertheless decides that it is not prepared at this time to rule out consideration of race, we urge the Court to adopt, at an absolute minimum, strict guidelines requiring State courts to demonstrate that consideration of race in a custody case is necessary to a compelling State interest. We urge that those guidelines include the following requirements. First, State courts should be required to find that it is not possible to resolve the best interest and welfare of the child or similar considerations on racially-neutral terms. *See* pp. 14-16, *supra*. Second, they should be required to find that consideration of race is "necessary" to a compelling State interest. *See* p. 9, *supra*. Such "necessity" must exist wholly apart from any generalizations about the impact that prejudice in our society might have on children. *See* pp. 11-13, *supra*. Third, the record must contain clear and convincing evidence that demonstrates why race is a necessary and relevant consideration in the particular case before the court. The need for individual proof and convincing evidence in these circumstances is underscored by at least two decisions of this Court.

In *Stanley* v. *Illinois*, *supra*, the Court, on due process and equal protection grounds, invalidated a State statute which effectively presumed the unfitness of an unwed father. 405 U.S. at 657-59. The Court emphasized the danger of a State employing presumptions of unfitness and failing to evaluate individual circumstances—

> But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to

> past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [*Id.* at 657 (footnote omitted).]

The Court further emphasized that: "The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove." *Id.* at 657-58.

The need for individual proof is further supported by *Santosky* v. *Kramer*, 455 U.S. 745 (1982), in which the Court held that the State of New York could not terminate parental rights unless it established "permanent neglect" by "clear and convincing evidence." *Id.* at 748. The Court recognized that the State had an interest in the welfare of the child and that the State's interest "is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." *Id.* at 767. In evaluating the appropriate standard of proof, both the majority and dissenting opinions agreed with the "conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* at 774.

These decisions demonstrate that a State must be required to prove—not presume—allegations of parental unfitness and must have "clear and convincing evidence" before it alters parental rights. We believe that no less a standard should apply if a State attempts to use race as a relevant consideration in a change of custody dispute. State courts cannot be permitted to presume a need for a change of custody as a result of a subsequent interracial marriage, and the record of each proceeding must show by clear and convincing evidence why race is a necessary and relevant consideration. Only then could a

record even conceivably demonstrate that a racial classification is both "necessary" to, *Loving* v. *Virginia*, *supra*, 388 U.S. at 11, and "precisely tailored" to achieve, a compelling governmental interest. *Plyler* v. *Doe*, *supra*, 457 U.S. at 217.

CONCLUSION

The judgment of the District Court of Appeal of the State of Florida, Second District, should be reversed.

Respectfully submitted,

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Dated: December 6, 1983

APPENDIX

APPENDIX

November 25, 1983

United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
UNITED STATES SUPREME COURT

A few weeks ago, my mother brought to my attention a newspaper article concerning a case (Palmore v. Sidoti) in which a white child was taken from her mother because her mother had remarried a black man. According to the article, the court in that case presumed that it would be detrimental to the white child's interest to be raised in an interracial home. As I read the article, I was appalled as I thought how that decision might affect my own life.

I am now sixteen years of age. When I was three, my mother (who is white) divorced my natural father (who is also white) and later remarried a black man, whom I have now come to call "dad." I no longer see my natural father and know little about him. However, over the past few years, I have sent him numerous letters requesting permission to be adopted by my dad. My natural father has answered none of these letters. I fear that he may still attempt to gain custody over me. If that happened, I would be forced to leave my family to live with a man I barely know and have not seen in more than five years.

I am writing this letter because I could be taken from my current home if the courts of this Nation are permitted to presume that an interracial home is an unfit home. I wish to relate to this Court my own experience of living in an interracial home for over twelve years. I hope that my experience in a loving and stable home

environment will show why courts should not be permitted to presume that an interracial home is detrimental to the interest of a white child.

As I think back to my early childhood, when my mother first met my dad (Tony), I remember little about the exact details. I remember nothing of his appearance, in particular of his race. My earliest recollection is of his coming to visit my mother's apartment in Washington, D.C. and his examining my ears to see if I had an ear infection.

In the Summer of that year, we moved to Boston, Massachusetts, and my mother and Tony were married in the Fall. We first lived on Beacon Hill, and I went to the Beacon Hill Nursery School. I have no recollection of the issue of race even arising, until my dad came to school one day to play the flute at naptime. I remember requesting that the lights be turned off, as was the normal procedure at naptime when we listened to records. I later learned that the teachers were alarmed by my request and called my parents in for a conference. The teachers were concerned that I might have wanted the lights to be turned down because my dad was black. I think that my dad (being a child psychiatrist) was satisfied that the color of his skin had nothing to do with my request. Although I do not think that my teachers were satisfied, the subject was dropped.

We spent the following year in England, where my dad was doing research. My mother (a psychologist) was not working at the time because she was pregnant (with my soon-to-be sister, Tanya). Throughout our stay in England, I do not recall a single problem resulting from my dad being black. The only difficulties that I faced stemmed from my having an American accent, which many of the children found humorous.

When we returned to Boston, we bought a house in the racially mixed community of South End, and I be-

gan to attend the Trotter School. It was a magnet school, meaning that white children were bused into a black neighborhood in which the school was situated. That particular year was the beginning of desegregation in a very segregated and prejudiced city. But I was only in second grade, and race meant little or nothing to children of my age. For second and third grades, my class was made up of an equal proportion of black and white children. My mom came to the school regularly to help some children with reading. My dad also visited the school. At the end of a talk that he gave, one of the boys asked to see his muscles, because I had told the boy how strong my dad was. I have a distinct recollection that everyone in the class was really impressed and thought that I was really neat to have a dad like that.

After third grade, I entered an advanced program that required me to switch to the Hennigan School. This is my first recollection of race really becoming important. Desegregation had reached its peak, as had various problems connected with it. For example, there were instances when windows in the school bus would get broken as we passed through black neighborhoods. In addition, the black children who rode on the school bus chose to sit in the back of the bus and the white children in front. For the first few weeks of school, some of the black girls picked on me, until one day my dad brought me to the bus stop and they found out that he was black. Although I never quite figured out why, they stopped bothering me at that point. But even then, race was only a concern on the school bus. Once in school, I was free to choose my friends regardless of race. As a result, I had just as many black friends as white ones.

As I got older, my parents used to tell me about various racial incidents occurring in Boston (demonstrations, fights, etc.). My mom and dad took part in one demonstration in South Boston, the heart of the most prejudiced neighborhood in the State. I recall that the police

protected the demonstrators until a policeman "by mistake" broke the line and a mob of white people broke through and a huge fight erupted. The Boston police did little to contain the situation. But because of my unique family situation, I was able to understand this and other incidents with a broader and clearer perspective than most of my white peers.

In the sixth grade, I attended the Bancroft School in my neighborhood. I was accepted as readily by the black children as by the white children. In the Spring of that year, I had my most unfortunate experience in race relations. With a class consisting equally of a number of different races, I went on a class field trip to the Arboretum. After lunch, about half of us decided to climb a hill behind us. In the process, we encountered about twenty strangers (all white children). Although we managed to avoid them at first, they later surrounded us. They were much bigger and began hitting the black children and burning them with cigarettes. These intruders ignored the white children in the class until we tried to help our friends. At that point, they began taunting us and calling us "nigger-lovers." They eventually left, and we were able to report the matter to the Park Police. A school board meeting was later called to discuss the problem. Although nothing very constructive resulted from the meeting, I think that there was a greater appreciation by the white children and their parents of problems facing black children. I mention this incident because I realized that this happened to me not because my father was black, but because of the racial tensions that existed in the community at that time.

The next year I began Boston Latin School, an old and well known public institution. It turned out to be different from every other school that I had previously attended—the white and Chinese children tended to stay together; the black children tended to stay together. Although I walked to school every day with a girl who was

of mixed racial background, we had our own group of friends during school, and we did not see each other until it was time to go home.

Seventh grade was the first time that I really worried about people finding out that my dad was black. Most of my close friends did not have black friends and did not particularly care to. I told friends that my dad was black only when they were about to meet him for the first time. I remember that one of my best friends said to me: "Really, wow what's that like?" But when I really thought about what I was doing, it seemed silly that I should have worried whether my friends would like me if they knew my dad was black. If they were not prepared to accept my dad, I would not have wanted to be friends with them. Reaching this awareness, I entered eighth grade more comfortable with myself, and I lost no friends because my dad was black.

After two years at Boston Latin, my family moved to St. Louis, Missouri. I now attend a very prestigious private school. At first, I again worried about how people might react to my dad being black. But early in the school year I called a close friend, told her that my dad was black and asked if that would bother people. She told me that a lot of people already knew and that it did not make any difference to them. In my class of 100, almost all of the children know that my dad is black, and like or dislike me without respect to that fact.

After being raised in an interracial home for over twelve years, I can say that my dad's race makes absolutely no difference to me. Although I worried about it from time to time, I now know that it was always an easy thing to handle. If people were going to judge me by the race of the man my mother chose to marry, I would not have cared to have their friendship, and there probably would have been something else to cause them to dislike me sooner or later.

But of far greater importance is the fact that I have been raised over the last twelve years in a happy and stable home. I am fortunate to have had a close and loving relationship with my mom, dad and sister. My home has prepared me to deal with any prejudice that I might have encountered and to recognize that people should not be prejudged. My personal experience has made me a more tolerant, sympathetic and understanding person, qualities which I hope to retain for a lifetime.

That completes my story. I hope that it will be helpful to this Court when it considers whether courts should be permitted to presume that an interracial home is detrimental to the interest of a white child.

I have asked Jay L. Carlson, my uncle and a Washington, D.C. lawyer, to assist me in presenting this letter to you in connection with the case of Palmore v. Sidoti.

Respectfully,

/s/

LEIGH EARLS

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IN THE

Supreme Court of the United States

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BRIEF *AMICI CURIAE* OF THE WOMEN'S LEGAL DEFENSE FUND AND THE NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE WOMEN'S LEGAL DEFENSE FUND AND THE NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amicus Women's Legal Defense Fund ("WLDF") is a private, non-profit organization, founded in 1971, that is dedicated to achieving equal rights for women. WLDF, with approximately 1,000 members, represents women and men in challenges to barriers to sexual equality and provides counselling and conducts public education programs on such matters as employment discrimination, education, and family law.

WLDF, through its Child Custody Project, engages in a number of activities relating to domestic relations and child custody issues in an effort to promote equitable and unbiased custody determinations. In this connection, WLDF prepares materials for public education, provides technical assistance to attorneys, compiles data, analyzes legislation, and serves as counsel of record or as *amicus curiae* in cases on appeal.

Amicus NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization founded in 1971 to perform a wide range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure for women full and equal rights under the law. NOW LDEF's parent organization, the National Organization for Women, is a nationwide membership organization of over 170,000 women and men in more than 750 chapters throughout the country.

NOW LDEF engages in various activities relating to family law issues. In 1979, NOW LDEF sponsored the National Assembly on the Future of the Family, a convocation that brought together national experts on family law issues and resulted in the publication of a comprehensive report and recommendations. In addition, NOW LDEF has participated as *amicus curiae* before this Court and various state courts in cases involving child custody, marital property, and other family law issues.

Amici's interest in this case arises from their commitment to ensuring adherence to the constitutional requirement of equal protection under the law and their dedication to serving the best interests of children by providing guidance to courts in custody disputes. In this case, the Florida courts reached a judgment that comports with neither the Constitution nor the best interests of the child.[1]

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[1] The parties' written consents to the filing of this brief are being filed with the Clerk pursuant to Rule 36 of the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Principally at issue in this case is the fate of one little girl, Melanie Lynn Sidoti. But also involved are issues of more general application concerning the relevance in custody disputes of judicial predictions about community attitudes towards families with members of different races and the meaning of the phrase "best interests of the child."

Melanie's parents were divorced on May 29, 1980, when Melanie was three. Custody was awarded to the mother, and Melanie, her mother, and Melanie's half-brother lived together as a stable family unit. In September 1981, Melanie's father petitioned for custody. The trial court ruled in March 1982, by which time both of Melanie's parents had remarried. The man Melanie's mother married is Black.

The trial court found both natural parents to be devoted and fit.[2] It found "no issue" as to the "respectibility of the new spouse of either parent."[3] But the court

> fe[lt] that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come."[4]

Little more said, the court found "substantial competent evidence of changed circumstances and that the best interest of the child will be served by awarding custody of the minor child to the father, . . ."[5]

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[2] *See* Order of Modification of Final Judgment, March 1, 1982, ¶ 1 (Petition for a Writ of Certiorari, Appendix A).

[3] *Id.*

[4] *Id.* ¶ 5.

[5] *Id.* ¶ 6.

The distinction the court drew between Melanie's parents based on the race of their spouses violated the constitutional guarantee of equal protection under the law. The court's prediction that Melanie would someday be stigmatized by the color of her stepfather's skin does not satisfy the heavy burden of justifying the state's use of the racial classification. Nor does such prediction satisfy the normally heavy burden of justifying a change in an award of custody or the court's obligation to base any determination to change custody upon substantial and competent evidence relating to the specific needs and interests of the particular child before it, including, at a minimum, the child's special relationship with her primary caretaker (in this case, her mother) and the child's need for continuity, security, and stability.

ARGUMENT

I. THE FLORIDA TRIAL COURT EMPLOYED A RACIAL CLASSIFICATION IN VIOLATION OF THE EQUAL PROTECTION OF THE LAW.

The constitutional principles governing this case are well settled. First, racial classifications are constitutionally suspect and must be strictly scrutinized.[6] Second, racial classifications may be upheld only if shown to advance a "compelling" or "overriding" governmental interest,[7] and if the particular use of race is "necessary" to the attainment of the government's objective.[8] Third, racial classifications will be considered "necessary" to

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[6] *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

[7] *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[8] *E.g.*, *In re Griffiths*, 413 U.S. 717, 722 (1973); *Dunn v. Blumstein*, 405 U.S. at 342; *McLaughlin v. Florida*, 379 U.S. at 196.

serve a compelling governmental interest only when "precisely tailored" to achieve that legitimate purpose.[9]

Applying these principles in this case compels reversal. First, in distinguishing between Melanie's parents (and favoring her father), the court employed a suspect classification based on the race of their spouses. Second, assuming that the state has a compelling interest in providing for the child's best welfare, the court's reliance on the racial characteristics of the child's home to justify changing custody does not satisfy the requirement that the particular use of the racial classification in fact advance that compelling state interest or be "necessary" to its accomplishment. And, third, the racial classification made here, based as it was on the court's generalized assumptions and unsupported predictions about community attitudes, was not precisely enough tailored—indeed, not tailored at all—to the best welfare of the only person about whom the state has any interest, Melanie Lynn Sidoti.[10]

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[9] *E.g., Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (racial classifications, "regardless of purported motivation," are "presumptively invalid and can be upheld only upon an extraordinary justification").

[10] The conclusion the lower court reached in this case, that a home of racially mixed adults is a less desirable environment in which to raise a child and that a child raised in such a home will inevitably be stigmatized, would logically apply in *all* custody cases involving interracial remarriages, regardless of the needs of the particular child or the attributes of the particular parents before the court. But courts may not "reason by presumption in child custody cases." *In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d 111, 122 (1982). Indeed, "reliance on a presumption that interracial environments are inherently detrimental to a child's interests may often result in granting custody to the less desirable parent, . . . undercutting the state interest in promoting the welfare of the child." *Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1342 (1980). Moreover, available

The court below decided to uproot Melanie because of its "feel[ing]" that, some day, she will be stigmatized by her mother's choice of mate. But "[c]ommunity prejudice, even when shown to exist, cannot be permitted to control the makeup of families." *In re Marriage of Kramer*, 297 N.W.2d 359, 361 (Iowa 1980). *A fortiori*, the makeup of families cannot be controlled by *predictions* of such prejudice, for "[p]ossible developments in the future" resulting from interracial marriage "are matters wholly of speculation and conjecture . . . ." *Potter v. Potter*, 372 Mich. 637, 127 N.W.2d 320, 326 (1964).[11] As the Iowa court quoted above said, parent-child relationships may not be dictated by "unsubstantiated judicial predictions concerning the effects of racial prejudice in the community." *In re Marriage of Kramer*, 297 N.W.2d at 361.[12]

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evidence does not indicate that children are adversely affected by interracial environments. *See, e.g.*, Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 Buffalo L. Rev. 303, 326 (1968); Comment, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. Ill. L.F. 256, 263 (1969).

[11] *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. at 1341 ("generalized assertions based upon vague fears or even upon speculative probabilities about the consequences of racial integration do not meet the heavy burden of justification placed on the state when it employs a racial classification"), *citing United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir.) (per curiam), *cert. denied*, 414 U.S. 1068 (1973) (vague fear or speculation that prison desegregation may result in violence would not justify continued segregation).

[12] *Accord, In re H.*, 66 Ohio App. 2d 178, 305 N.E.2d 815, 819 (1973) ("[T]he American 'melting pot' will continue to bring about the marital union of persons of different racial, religious and cultural backgrounds. The law wisely does not and should not interfere with this process."). *Cf. Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns").

What is important in deciding the fate of a child caught in a custody tug-of-war is not skin color or the prejudices (real or imagined) of others, but rather the nature, strength, and quality of the relationship between the child and the adult upon whom the child has come primarily to rely for continuous care and affection,[13] as well as the ability and willingness of that adult to love, guide, teach, and respect the child and to model and reinforce positive character traits, including freedom from prejudice. Although racial prejudice may still be an unfortunate fact of life, "if children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such." *Commonwealth ex rel. Lucas v. Kreischer*, 450 Pa. 352, 299 A.2d 243, 246 (1973).[14]

Indeed, to distinguish between people on the basis of their color and to allow racial prejudice to play a role in the court's decisionmaking tends invariably to give

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[13] *See* pp. 10-14, *infra*.

[14] *Accord, In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d at 120 ("A court may not assume that because children will encounter prejudice in one parent's custody, their best interests will be served by giving them to the other parent. If the children are taunted and hurt because they live with a black man, with love and help they may surmount their hurt and grow up strong and decent—the sort of children any parent would be proud of").

Many other courts in custody disputes have similarly disregarded the complexion of a parent's spouse. *See, e.g., In re Marriage of Kramer*, 297 N.W.2d at 361; *Edel v. Edel*, 97 Mich. App. 266, 293 N.W.2d 792 (1980); *Boone v. Boone*, 90 N.M. 466, 565 P.2d 337 (1977); *Commonwealth ex rel. Myers v. Myers*, 468 Pa. 134, 360 A.2d 587, 591-92 (1976); *Tucker v. Tucker*, 14 Wash. App. 454, 542 P.2d 789 (1975); *In re H.*, 66 Ohio App. 2d 178, 305 N.E.2d at 818; *Langin v. Langin*, 2 Ill. App. 3d 544, 276 N.E.2d 822 (1971); *Stingley v. Wesch*, 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966); *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952).

credence to, to legitimize, and perhaps even to perpetuate, the very kind of discrimination the law seeks to eradicate.[15] There is no reason for a court to "*yield* to prejudice" simply "because it cannot *prevent* prejudice." *In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d 111, 120 (1982) (emphasis in original).[16]

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[15] Courts in other contexts have repeatedly refused to legitimize offensive classifications by yielding to public prejudice. *See, e.g., Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (while "the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act [Title VII] was meant to overcome"); *see also, e.g., Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1534 (1983) ("consumer preference" cannot justify a discriminatory practice); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) ("stereotyped customer preference cannot justify a discriminatory practice"); *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1181 (7th Cir. 1982) ("It is clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clients do not like his race").

[16] As one court, considering a case very much like the instant case, stated:

> The Fourteenth Amendment requires that a Court refuse to become a party to any discrimination based on race. Thus any consideration of the stepfather's race, or of the race of the mother's associations, or of the neighborhood racial mix, would result in a Court making its determination on the basis of factors which the Fourteenth Amendment prohibits from consideration.
>
> * * *
>
> While the Constitution cannot prevent bigotry, it can prevent an individual from involving the State, through its Courts in such bigotry.

DeLander v. DeLander, excerpted in 37 U.S.L.W. 2139 (Super. Ct. Calif. 1968).

II. THE FLORIDA TRIAL COURT FAILED TO MAKE A SUFFICIENTLY THOROUGH AND PARTICULARIZED DETERMINATION OF THE CHILD'S BEST INTERESTS.

In Florida, a parent seeking to change a custody order carries an "extraordinary burden."[17] In order to support a change, there must be "*competent, substantial* evidence that (1) there has been a substantial or material change in the condition of the parties and (2) the best welfare of the child will be promoted by the change in custody." *Stricklin v. Stricklin*, 383 So. 2d 1183, 1184 (Fla. Dist. Ct. App. 1980) (emphasis added).

In this case, the pivotal reason for the change in custody was the trial court's "feel[ing]" that Melanie would someday be stigmatized by the race of her mother's husband.[18] Even if a parent's remarriage to a person of a different race could ever be considered a "substantial and material change" and even if it were constitutionally permissible to consider race in a custody dispute, there is no evidence—let alone "competent, substantial evidence"—that Melanie had been or would be harmed or prejudiced in any way by the color of her stepfather's skin.

Rather than focusing on the racial element, the lower court here should have made a particularized determination as to what would best serve the interests of Melanie Lynn Sidoti based on factors bearing directly and uniquely on her adjustment and development:

> Surely, it is not asking too much to demand that a court, in making a determination as to the best in-

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[17] *Elkins v. Vanden Bosch*, 433 So. 2d 1251, 1252 (Fla. Dist. Ct. App. 1983); *see also, e.g., McGregor v. McGregor*, 418 So. 2d 1073, 1074 (Fla. Dist. Ct. App. 1982).

[18] It is clear from the trial court's opinion that the racial element was pivotal to the modification order. The court made reference to few other factors, and those it referenced were basically in equipoise as between Melanie's parents. *See generally* Order of Modification of Final Judgment, March 1, 1982 (Petition for a Writ of Certiorari, Appendix A).

> terest of a child, make the determination upon *specific evidence relating to that child alone.* As one court has aptly noted, magic formulas have no place in decisions designed to salvage human values.

Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978) (en banc) (emphasis added).

Chief among the factors the court failed to consider is Melanie's need for stability and continuity of affectionate, nurturing care. From her birth in 1977, through her parent's separation in 1979 and divorce in 1980, and until the trial court's order in 1982, Melanie lived with her mother, who was primarily responsible for her care. No apparent importance was given to the special attachment that inevitably bound Melanie to her "primary caretaker" or "psychological parent" (in this case, her mother), an attachment resulting from "day-to-day interaction, companionship, and shared experiences" and her mother's daily attention to Melanie's "needs for physical care, nourishment, comfort, affection, and stimulation." [19]

Failure of the court to consider Melanie's relationship to her primary caretaker invalidates any claim that the trial court took into account the best interests of the child, which in Florida, as elsewhere, is the touchstone of any custody change and, in turn, the "compelling" state interest that the court's determination here allegedly ad-

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[19] J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* at 19, 17 (1979). *See also, e.g.*, Leonard and Provence, *The Development of Parent-Child Relationships and the Psychological Parent*, 53 Conn. B.J. 320, 326 (1979) (psychological parent is adult who fulfills the child's "needs for nourishment, warmth, physical care, protection, comfort, and affection"); Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths* (1982), in I. Diamond (ed.), *Families, Politics and Public Policy* 187 (1983); Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 Women's R. Law Rep. 235, 237, 243 (1982).

vanced.[20] For no court charged with deciding a child's best interests may be unmindful of the consequences of severing the tie that binds a child to his primary caretaker and disrupting the continuity and stability on which the child has come to depend.[21]

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[20] *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 Fam. L.Q. 304, 304-05 (1969) ("first and foremost" among the needs of children are their needs "for stability of home environment and constancy and continuity of personal attachments formed"); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Prob. 226, 288 (1975) ("[T]he court should prefer a psychological parent (*i.e.*, an adult who has a psychological relationship with the child from the *child's* perspective) over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent. To award custody to a person who is a 'stranger' to the child would unnecessarily risk harming the child where the other claimant has, on a continuing, day-to-day basis, fulfilled 'the child's psychological needs for a parent as well as his physical needs.' ").

[21] *See, e.g.*, J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* at 17-20, 31-34, 37-39; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Prob. at 265; J. Bowlby, *Separation* (1973); J. Bowlby (ed.), *Child Care and the Growth of Love* (1965); A. Freud & D. Burlingham, *Infants Without Families: The Case For and Against Residential Nurseries* (1944). Continuity of relationships is particularly critical for young children. According to J. Goldstein, *et al.*, a change of the caretaking person for infants and young children produces "separation distress and anxiety" and causes "setbacks in the quality of their next attachments, which will be less trustful." *Beyond the Best Interests of the Child* at 33. For children under five, disruptions of continuity affect "those achievements which are rooted and develop in the intimate interchange with a stable parent figure, who is in the process of becoming the psychological parent . . . [such as] cleanliness and speech." *Id.*

The time spent by a child and his or her primary caretaker not only creates a bond between them whose severance may be harmful to the child, but also it provides a sound basis for a judgment about the child's future welfare; if in the past the primary caretaker has exhibited good parenting skills, the court may "predict that those qualities will continue." *Commonwealth ex rel. Jordan v. Jordan*, 302 Pa. Super. 421, 448 A.2d 1113, 1115 (1982).

The importance of maintaining the child's bond with the parent who has principally provided for the child's daily care and nurturance has been emphasized in a number of recent decisions. In *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981), for example, the court held that, assuming fitness, the "best interests of the children [of tender age] are best served in awarding them to the primary caretaker parent, . . ."[22] Similarly, in *Commonwealth ex rel. Jordan v. Jordan*, 302 Pa. Super. 421, 448 A.2d 1113, 1115 (1982), the court reversed an order transferring custody of a five-year old child who, like Melanie, had lived his entire life with his mother, holding that

> where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker. Not to do so ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs.[24]

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[22] The court identified the following functions as among those ordinarily performed by a child's primary caretaker parent:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day care, etc.; (7) putting child to bed at night, attending to child in middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and (10) teaching elementary skills, i.e., reading, writing and arithmetic.

278 S.E.2d at 363.

[23] The court reached this conclusion based on its understanding that "the continued presence of a fit parent who through daily affection, guidance, companionship, and discipline fulfills the child's psychological and physical needs is crucial to the child's emotional

As yet another court stated, "[T]he rearing of a child requires greater stability than a roller-coaster treatment of custody." *Dintruff v. McGreevy*, 34 N.Y.2d 887, 316 N.E.2d 716, 359 N.Y.S.2d 281, 281 (1974).[24]

The importance to a child of continuity and stability and the tie between a child and his or her primary caretaker has been recognized in Florida as well. Thus, in *Culpepper v. Culpepper*, 408 So. 2d 782, 785 (1982), the court refused to remove a child from the care of his "primary custodial parent" where both parties were fit, custody had been awarded to the mother when the child was very young, and there was no evidence that the child had been adversely affected in any way by the mother's conduct. *See also Agudo v. Agudo*, 411 So. 2d 249, 252 (Fla. Dist. Ct. App. 1982) (reversing order changing residence of young

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well being," and that the "removal of a young child from an established home with one parent has long been recognized as a factor which bears upon his emotional well-being" and "can seriously disrupt a child's life." 448 A.2d at 1115.

[24] *See also, e.g., Nale v. Nale*, 409 So. 2d 1299, 1302 (La. Ct. App. 1982) (court must consider that it "would be harmful" to alter relationship between child and parent who provided child with "'continuous care and affection'"); *Pamela J.K. v. Roger D.J.*, 277 Pa. Super. 579, 419 A.2d 1301, 1307 (1980) (a court should "consider the advantages and risks of a change in custody. This court has noted the importance to a child's development of a stable relationship with an established parental figure and a known physical environment"); *Rice v. Rice*, 415 A.2d 1378, 1383 (D.C. 1980) (courts are aware of the danger that children will be disturbed by changes in custody and "'are generally reluctant to modify existing custody arrangements'"); *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256, 1259 (Super. Ct. 1979) ("In assessing a claim of changed circumstances deference is given to the length and stability of the existing custody relationship" because of the "potential for damage which resides in removing a child from its psychological parent"); *In re Marriage of Derby*, 31 Or. App. 803, 571 P.2d 562, 567, *mod. on other grounds*, 31 Or. App. 1333, 572 P.2d 1080 (1977) (en banc) ("the close and successful emotional relationship between the primary parent and the children coupled with the age of the children dictate the continuance of that relationship").

child, noting deleterious effect change may have on child in the bonding stage of development).[25]

Culpepper and the other decisions cited above give meaning to the "best interests of the child" test in terms that are relevant to the child before the court. The decision of the trial court in the instant case utterly fails in this regard.

CONCLUSION

For the foregoing reasons, the decision of the Second District Court of Appeal should be reversed.

Respectfully submitted,

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[25] Although the Florida trial court's failure to consider Melanie's need for security and continuity was its most significant error of omission, there are other considerations that also were ignored. For example, because "divorces and custody disputes are traumatic enough without needlessly severing sibling relationships" (*Craig v. McBride*, 639 P.2d 303, 306 (Alaska 1982)), courts ordinarily "will not disrupt sibling relationships unless there is some overwhelming need to do so" (*Pawelski v. Buchholtz*, 91 A.D.2d 1200, 459 N.Y.S.2d 190, 191 (1983)). (The "desirability of keeping the children of the family together so that they may enjoy the normal conditions of childhood of growing up together as brothers and sisters" applies equally in cases, like this case, involving half-siblings as well as siblings of the same two parents. *E.g., Pawelski v. Buchholtz*, 459 N.Y.S.2d at 191; *Craig v. McBride*, 639 P.2d at 306 n.9; *Albright v. Commonwealth ex rel. Fetters*, 491 Pa. 320, 421 A.2d 157, 161 (1980).) No "overwhelming need" to separate Melanie from the half-brother with whom she had always lived—indeed, no need at all—was shown here.

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No. 82-1734

In the Supreme Court of the United States

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE, PETITIONER

v.

ANTHONY J. SIDOTI

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state court from considering or relying upon the subsequent interracial marriage of a custodial parent as a ground for ordering a change in custody.

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ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

State-imposed racial classifications, such as that involved in this case, strike at the very heart of the Fourteenth Amendment's guarantee of equality before the law. As a general matter, the federal government has no interest in child custody proceedings. But the federal government does have a special interest in ensuring that the states exercise their regulatory powers without infringing upon fundamental rights guaranteed to every individual by the Constitution. Thus, the United States has participated as amicus curiae in cases such as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Moreover,

Section 5 of the Fourteenth Amendment empowers Congress to enact appropriate legislation to enforce the Fourteenth Amendment against the states. Pursuant to Section 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, the United States may intervene in any federal suit "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race [or] color." The United States therefore has a substantial interest in the Court's resolution of the equal protection issue raised in this case.[1]

STATEMENT

Petitioner and respondent, both white, were divorced on May 29, 1980, by order of the Circuit Court of the Thirteenth Judicial Circuit of Florida (Pet. 3). At that time, petitioner was awarded custody of their three year-old child, Melanie (*ibid.*). On September 20, 1981, respondent filed a petition to modify the divorce decree, seeking to have custody of the child awarded to himself (*ibid.*; Pet. App. 23). Petitioner was then living with a black man whom she married a short time later, on November 21, 1981 (*id.* at 24). Respondent's principal argument in support of his petition to modify the custody order was the fact that petitioner was living with a black man, thereby allegedly creating a bad environment for the child (*ibid.*). Respondent also alleged that Melanie

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[1] Relying on *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), petitioner also argues (Pet. 14-15) that the state court's decision in this case violates substantive due process. Because we believe the equal protection issue is dispositive, we do not address the due process issue. See *Caban* v. *Mohammed*, 441 U.S. 380, 394 n.16 (1979).

had had head lice on two occasions and that he had found her wearing mildew-stained clothing (*ibid.*).

On February 1, 1982, the Circuit Court held a hearing on respondent's petition for a change in custody. The evidence at the hearing consisted of the testimony of both parties and an investigative report prepared for the court by a Circuit Court Counselor (Pet. App. 23). On March 1, 1982, the Circuit Court issued an order awarding custody to respondent (*id.* at 23-28). The court made no findings with respect to what it termed respondent's "secondary" allegations concerning the head lice and the mildew-stained clothing (*id.* at 24). The court did find that petitioner had cohabited with her present husband before marriage and that one other male had been at her house on one occasion (*id.* at 24-25). The court also noted, however, and apparently accepted, petitioner's testimony that no sexual activity ever took place in the child's presence (*ibid.*). In addition, the court found that "both parties have remarried, and there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent" (*id.* at 24).

The court relied on the report of the Circuit Court Counselor who, the court noted, had "made a[n] [earlier] report in a case coming out of this Circuit also involving the social consequences of an interracial marriage. *Niles v. Niles*, 299 So. 2d 162" (Pet. App. 25). The counselor's recommendation was the same in both cases—custody of the child should be taken away from the mother because the mother " 'had chosen for herself and therefore for herself and her children, a life style unacceptable to the father of the children, a life style unacceptable to the father

of the children and the society in which we live' " (*id.* at 26 (citation omitted)).[2]

The court agreed with the counselor's recommendation and ordered the change in custody (Pet. App. 26-27):

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

Petitioner appealed to the Florida District Court of Appeal, Second District, which affirmed without opinion (Pet. App. 29). Because the Court of Appeal did not issue an opinion, the Supreme Court of Florida was without jurisdiction to review the case. See Fla. Const. Art V, § 3(b); cf. *Golden Leaf Bakery, Inc.* v. *Charles W. Rex Construction Co.*, 334 So. 2d 585 (Fla. 1976).

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[2] Although the Circuit Court Counselor's report mentioned other factors bearing on the custody issue, the court relied only upon the counselor's comment about petitioner's choice of life style.

SUMMARY OF ARGUMENT

A. The state court's decision in this case explicitly classifies on the basis of race by treating the custody determination differently than would have been the case had petitioner married a white man. Such explicit racial classifications are "presumptively invalid" (*Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979)), and they may be sustained only upon an "extraordinary justification" (*ibid.*) demonstrating the existence of a compelling governmental interest.

This stringent standard of review is not altered by the possibility that the state courts might apply the racial classification at issue to whites as well as blacks. "Equal application" of discriminatory classifications was rejected by this Court in *Loving* v. *Virginia*, 388 U.S. 1, 8 (1967), and it cannot save the racial classification at issue in this case.

B. The state interest asserted in support of the racial classification employed in this case is in preventing the social stigmatization that the court believed was "sure to come" (Pet. App. 27) if petitioner's child were raised in an interracial home. Notwithstanding the strong interest of a state in safeguarding the best interests of children whose homes must be designated by the state, prior decisions of this Court firmly establish that states may not accommodate their decisions to the continued existence of racial prejudice in our society, whether to prevent racial unrest generally or to protect the potential victims of such prejudice in particular. See, *e.g.*, *Lee* v. *Washington*, 390 U.S. 333 (1968); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Florida law provides that in all custody matters its courts are to be guided by the "best interests of the child." Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). In recognition of the fact that it is no business of government to accommodate actual or perceived popular prejudice, other states employing the same standard have held that the racial considerations that formed the basis for the decision below are irrelevant to the "best interests" determination. See cases cited at pages 11-12, *infra*. This is so not only because no valid evidence exists to support the proposition that living in an interracial home is inherently harmful to a child, but also because consideration of race in custody proceedings would as effectively penalize a parent's right to marry freely regardless of race (*Loving* v. *Virginia*, *supra*) as if the state continued to maintain an outright ban on interracial marriages. Moreover, the strength of petitioner's interest in retaining custody of her child (cf. *Santosky* v. *Kramer*, 455 U.S. 745 (1982)) makes the employment of racial classifications all the more impermissible. In short, race must be altogether stricken from consideration in custody determinations.

C. There is no merit to respondent's contention (Br. in Opp. 3-7) that the decision below rests on adequate and independent state grounds. Although the Circuit Court noted that petitioner had cohabited with her present husband prior to marriage, that finding is insufficient under state law to support the order changing custody. Under Florida law, a custodial parent's sexual conduct is relevant to a change-of-custody proceeding only to the extent that it has had a demonstrable adverse effect on the child. No such finding was made in this case; on the contrary, it is clear from the Circuit Court's opinion that no change in custody would have been ordered absent the

fact of petitioner's remarriage to a black man. Accordingly, petitioner's Equal Protection challenge is squarely before this Court.

ARGUMENT

THE FLORIDA COURT VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS BY REMOVING HER CHILD FROM HER CUSTODY ON ACCOUNT OF HER INTERRACIAL MARRIAGE

A. Consideration Of A Custodial Parent's Subsequent Interracial Marriage As A Ground For Modifying A Custody Order Constitutes A Presumptively Invalid Racial Classification That Can Be Justified Only If Precisely Tailored To Serve A Compelling State Interest

The power to regulate marriage, divorce, custody, and child welfare resides in the states, but that power is subject to the commands of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967). The state court's decision in this case[3] explicitly classifies according to race by deciding the custody issue on the basis of petitioner's remarriage to a black man.[4] See *Loving* v. *Virginia*, 388 U.S. at 11; see also *McLaughlin* v. *Florida*, 379 U.S. 184, 188 (1964). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320

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[3] It is well established that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948).

[4] It is clear from the record that race was the primary (and probably the exclusive) basis for the state court's decision. See pages 17-18 & notes 10-11, *infra*.

U.S. 81, 100 (1943). These distinctions are odious because they are premised on the arbitrary and irrelevant basis of skin color—a basis for state action that the Fourteenth Amendment was specifically intended to eliminate. See *Loving* v. *Virginia*, 388 U.S. at 10; *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873). Accordingly, when such racial classifications are at issue, the state must "demonstrate that its classification [is] precisely tailored to serve a compelling governmental interest." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979).

This stringent standard of review is not in any way relaxed, as respondent contends (Br. in Opp. 11), by the possibility that the state courts might also consider the effects on a black child of being raised in an interracial household.[5] That a particular racial classification does not operate uniquely to the detriment of one race, but rather spreads disadvantage indiscriminately among all races, is without constitutional significance. *Loving* v. *Virginia*, 388 U.S. at 9 ("the fact of equal application does not im-

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[5] Commentators have observed, however, that consideration of race in custody proceedings typically occurs in the situation presented here, in which the white mother of a white child subsequently marries a black man. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 Buffalo L. Rev. 303, 304 (1968); Note, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. Ill. L.F. 256, 257, 263. The observation is borne out by the cases cited at pages 11-12, *infra*.

munize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); *McLaughlin* v. *Florida*, 379 U.S. at 188-192. The Equal Protection Clause does not "protect" certain racial classes to the exclusion of others; it protects all persons from invidious racial classification. As the Court stressed in *Shelley* v. *Kraemer*, 334 U.S. at 22, the Equal Protection Clause creates "personal rights," "guaranteed to the individual." It is thus no answer to say that the rights of individuals of both races may be infringed. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities" (*ibid.*).

The Circuit Court treated petitioner's sexual relationship with a black man and her subsequent marriage to him differently than it would have had the man been white. Petitioner's right to marry freely regardless of race was thus burdened in a way that the same right of other custodial parents is not. This differential treatment of an interracial marriage constitutes a presumptively invalid racial classification.

B. The State Court's Racial Classification Is Not Precisely Tailored To Serve A Compelling State Interest

1. The state interest asserted in support of the racial classification established below is in preventing the social stigmatization that the court believed was "sure to come" (Pet. App. 27) if Melanie continued to live in an interracial home. It cannot be denied that the State of Florida has a valid interest in safeguarding the best interests of children whose homes are to be designated by the state's divorce courts. Nor can it be denied that racial prejudice still exists in our society and that children subjected to such prejudice may be adversely affected.

Nevertheless, this Court has made it clear in a variety of contexts that bowing to popular prejudice, whether to protect the potential victims of such prejudice or to avoid racial unrest generally, cannot constitute a sufficient justification for departing from the constitutional command of equal protection. In *Buchanan* v. *Warley*, 245 U.S. 60 (1917), the Court unanimously invalidated an ordinance barring blacks from acquiring residences in predominantly white neighborhoods and barring whites from acquiring residences in predominantly black neighborhoods. The Court stated (*id.* at 81) that:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

See also *Watson* v. *City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting claim that gradual "facility-by-facility" desegregation of municipal parks was "necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) ("[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."). Even in the prison context, in which racial unrest is often intense and the threat of violence ever present, the Court has indicated that the Fourteenth Amendment does not permit prison officials to make blanket celling classifications according to race to accommodate the prejudices of inmates or to prevent racial conflict assumed to be inevitable. See *Lee* v. *Washington*, 390 U.S. 333 (1968); see also *id.* at 334 (Black, J., concurring).

The governing principle of these cases was cogently stated by Justice White: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting). In short, the existence of racial prejudice in our society cannot serve as a permissible basis for employing racial classifications.

2. Florida law provides that in all custody matters the courts are to be guided by the "best interests of the child." Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). In other states employing the same standard, the racial considerations that formed the basis for the decision below have been held irrelevant to the "best interest" determination. See *In re Marriage of Kramer*, 297 N.W.2d 359, 361 (Iowa 1980) ("[c]ommunity prejudice, even when shown to exist, cannot be permitted to control the makeup of families"); *Potter* v. *Potter*, 372 Mich. 637, 648, 127 N.W.2d 320, 326 (1964) (citation omitted) (possible future effects on child of mother's interracial marriage " 'are matters wholly of speculation and conjecture, and as such may not affect the present [custody] determination' "); *Edel* v. *Edel*, 97 Mich. App. 266, 293 N.W.2d 792 (1980) (white mother's relationship with and plans to marry a black man irrelevant to custody determination); *In re Brenda H.*, 305 N.E.2d 815, 819 (Ohio C.P. 1973) (white mother's marriage to a black man is of "no significance" in custody determination); *Commonwealth ex rel. Myers* v. *Myers*, 468 Pa. 134, 144, 360 A.2d 587, 591 (1976) (father's concern that his children might have

"racial problems" due to mother's relationship with a black man "is not relevant" in custody determination); *Commonwealth ex rel. Lucas* v. *Kreischer*, 450 Pa. 352, 299 A.2d 243 (1973) (interracial marriage cannot be sole reason for denying custody).

These decisions correctly recognize, contrary to the state court's decision in this case, that the custodial parent's subsequent interracial marriage is simply an impermissible consideration in a change-of-custody proceeding. As one court has noted (*In re Brenda H.*, 305 N.E.2d at 819 (emphasis added)):

> Irrespective of the chances for success or failure of bi-racial or other "mixed" marriages and in spite of abounding prejudice of all kinds (racial, ethnical [sic] and religious) the American "melting pot" will continue to bring about the marital union of persons of different racial, religious and cultural backgrounds. *The law wisely does not and should not interfere with this process.*

It is of course settled that a state may not criminally prosecute those who choose as their spouse a person of a different race. *Loving* v. *Virginia*, *supra*. It necessarily follows that a state may not penalize the right to marry freely regardless of race by taking away the children of persons who exercise that right. Indeed, in light of the strength of petitioner's interest in keeping her child (cf. *Santosky* v. *Kramer*, 455 U.S. 745 (1982)), permitting race to be considered in change-of-custody proceedings burdens petitioner's right to marry as effectively as if the state had attempted to prohibit the marriage altogether.

In addition to Florida, one other state allows consideration of a subsequent interracial marriage so long as race is not treated as the "controlling" factor

in custody determinations.[6] *Russell* v. *Russell*, 80 Ill. App. 3d 41, 43, 399 N.E.2d 212, 215 (1979) (permissible for trial court to acknowledge potential social pressures attributable to interracial marriage so long as race alone is not the decisive factor); *Langin* v. *Langin*, 2 Ill. App. 3d 544, 547, 276 N.E. 2d 822, 824 (1971) (quoting *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 486, 133 N.E.2d 532, 535 (1976)) (" 'race alone can[not] outweigh all other considerations and be decisive of the question [of custody]' ").[7]

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[6] In the instant case, it appears that racial considerations were given controlling weight (see pages 17-18 & notes 10-11, *infra*). But the Circuit Court relied (Pet. App. 25) on a prior Florida case holding that the "effect of an interracial marriage upon a particular child is but one of many factors which may be considered in determining the person in whose custody the child's best interest would be served." *Niles* v. *Niles*, 299 So. 2d 162, 162-163 (Fla. Dist. Ct. App. 1974). In light of this language, and because there were other factors present in *Niles* that arguably supported a change in custody, one commentator has suggested that *Niles*, if strictly construed, authorizes consideration of racial factors only to the extent that demonstrable harm to a particular child can be shown. Comment, *Child Custody—Interracial Marriage May be Considered in Framing Custody Modification Orders*, 3 Fla. St. U.L. Rev. 290, 293 n.6, 300 (1975). So construed, *Niles* does not support the decision below. See page 15 note 9, *infra*.

[7] Similar results have been reached by courts considering custody disputes following the divorce of an interracial couple. *See Beazley* v. *Davis*, 92 Nev. 81, 545 P.2d 206 (1976) (unconstitutional to deny a white mother custody of her children solely because they share the physical characteristics of their black father); *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956) (race alone cannot outweigh all other factors in the custody determination); *Tucker* v. *Tucker*, 14 Wash. App. 454, 542 P.2d 789 (1975) (declines to follow an earlier decision of the Supreme Court of Washington, *Ward* v. *Ward*, 36 Wash. 2d 143, 216 P.2d 755 (1950), and rules that race is relevant but not controlling).

It is our view that these decisions are erroneous. Once race is held to be a "relevant" consideration, it is virtually impossible to prevent it from becoming the "controlling" consideration in any particular case. If, for example, the natural parents are each found equally fit, then consideration of one parent's subsequent interracial marriage necessarily will be converted into the decisive factor. Moreover, even if it could be confined to "relevant" rather than controlling status, considering race at all in the custody decision would be unconstitutional. As one court has recognized, "[t]he very act of considering race as a factor, and then disregarding it as a controlling factor, requires that the state admit contrary to the Constitution, that there are differences in human beings because of their color." *DeLander* v. *DeLander*, 37 U.S.L.W. 2139, 2139 (Cal. Super. Ct. Aug. 14, 1968).[8] We therefore submit that race should be

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[8] In adoption proceedings, which also are governed by the "best interests of the child" standard, many courts have concluded that race may be considered but cannot be controlling. See *Drummond* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955); *Compos* v. *McKeithen*, 341 F. Supp. 264 (E.D. La. 1972) (three-judge court); *In re R.M.G. & E.M.G.*, 454 A.2d 776 (D.C. 1982); *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E.2d 51 (1962); *Rockefeller* v. *Nickerson*, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962); see also *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967).

In the adoption area, therefore, courts appear to be more willing to allow serious consideration of racial factors than in child custody disputes between natural parents. Whether or not these decisions are correct (a question not now before the Court), various rationales have been advanced to justify a distinction between adoption proceedings and custody pro-

altogether stricken from consideration in change-of-custody proceedings.[9]

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ceedings. In the adoption context, the prospective parents ordinarily have no legal claim to the child. Cf. *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 838-847 (1977). In addition, the nature of the state's interest in regulating adoptions is different. Traditionally, the object has been to find a couple that could have biologically parented the child in order to provide, as nearly as possible, the family environment he or she might otherwise have had. There has thus been an effort to "match" the physical characteristics, including race, of children and their prospective parents. See *Drummond*, 563 F.2d at 1205-1206. The wisdom of race matching has been the subject of some controversy (see Grossman, *supra* note 5, at 318-319), but most commentators agree that race should be considered. Note, *supra* note 5, at 261; *Grossman*, *supra* note 5, at 346. But these factors have no bearing in custody disputes between a child's natural parents, each of whom has an equal claim to the child.

[9] Even if we were to assume, arguendo, that the existence of racial prejudice could ever serve as a permissible basis for employing racial classifications, such a justification is clearly inadequate in this case because there has been no finding that Melanie would in fact be adversely affected by community reaction to petitioner's interracial marriage. The only "evidence" of detriment to Melanie was respondent's testimony to his own feelings that the mixed marriage would put a strain on the child and the Circuit Court Counselor's conclusion that petitioner's choice of a life style unacceptable to respondent and to society was a ground for changing custody. The court rejected respondent's "resentment" of petitioner's choice of a black partner as a basis for changing custody, but rested its decision on the speculation that social stigmatization was sure to come. The court heard no expert testimony on this subject, and the commentators have found no authoritative evidence that an interracial home life is inherently harmful to a child. See Note, *supra* note 5, at 263; *Comment*, *supra* note 6, at 296-299; Note, *Custody Disputes Following the Dissolution of Interracial Marriages: Best Interests of the Child or Judicial Racism?*, 19 J. Fam. L. 97, 102 (1980).

C. No Independent And Adequate State Ground Supports The Judgment Below

There is no merit to respondent's contention (Br. in Opp. 3-7) that the decision below rests on independent and adequate state grounds. Respondent relies primarily (*id.* at 5) on the Circuit Court's finding that petitioner had cohabited with her present husband prior to marriage (Pet. App. 24-25, 26), but that finding is insufficient under state law to support the order changing custody.

Florida law grants the trial court broad discretion in making initial custody determinations. *Culpepper* v. *Culpepper*, 408 So. 2d 782, 784 (Fla. Dist. Ct. App. 1982). Mothers and fathers are to be given equal consideration in such determinations. Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). Once a custody determination has been made, however, a party seeking a change in custody carries an "extraordinary burden" (*McGregor* v. *McGregor*, 418 So. 2d 1073, 1074 (Fla. Dist. Ct. App. 1982)), and the court has less discretion to modify a decree than it does when making the initial custody determination. *Culpepper*, 408 So. 2d at 784. A change in custody may be ordered only upon "competent, substantial evidence" showing (1) that there has been a "substantial or material change" in the parties' circumstances *and* (2) that the best welfare of the child will be promoted by a change in custody. *Stricklin* v. *Stricklin*, 383 So. 2d 1183, 1184 (Fla. Dist. Ct. App. 1980).

Petitioner's relationship with a man and her subsequent marriage to him undoubtedly constitute a "substantial or material change" within the meaning of the first prong of the test. But the extramarital sexual conduct of a custodial parent is not automatic

grounds for a change in custody. Such conduct may support an order changing custody only if there is evidence that it adversely affects the welfare of the child. *Lisenby* v. *Lisenby*, 419 So. 2d 354, 355 (Fla. Dist. Ct. App. 1982); *Culpepper*, 408 So. 2d at 784-785. In *Lisenby*, the court reversed an order removing a child from a mother who, like petitioner here, had engaged in sexual activity with men, including her subsequent husband, but never in her child's presence.

The Circuit Court opined (Pet. App. 26) that petitioner's sexual conduct "tended to place gratification of her own desires ahead of her concern for the child's future welfare," but the court did not conclude that Melanie was, in fact, adversely affected by petitioner's sexual conduct. Thus, under Florida law, petitioner's sexual conduct cannot support the order removing the child from her custody. Indeed, but for the court's concern for the anticipated effects of petitioner's interracial marriage on the child, nothing in the opinion suggests that a change in custody would otherwise have been ordered.[10] The court found "no issue" as to petitioner's "devotion to the child, adequacy of housing facilities, or respectability" of her new spouse (*id.* at 24). The judgment therefore necessarily rests primarily, if not exclusively, on the court's concern for what it perceived to be the inevitable "social stigmatization" to be suffered by

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[10] Respondent also argues (Br. in Opp. 5) that the Circuit Court "referenced" testimony to the effect that Melanie had had head lice on two occasions and that she spent eight hours each day in a day-care center. But the Circuit Court made no findings with respect to the head lice, nor did it give any indication that that matter or the day care issue played any part in the ultimate decision.

Melanie because her mother had married a black man.[11]

Even if the Circuit Court's statement about petitioner's conduct tending to place her own interests ahead of her child was meant to be a finding of adverse effect on the child, this Court would still have jurisdiction. The Circuit Court explicitly rested its judgment on the perceived effects of the interracial marriage as well, and it never indicated that petitioner's sexual conduct standing alone was of such import as to warrant the change in custody. The Equal Protection Clause is violated whenever racial purpose is among the motivating factors for an official decision if other grounds standing alone are not adequate to support it. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266, 270-271 n.21 (1977); *Mt. Healthy City*

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[11] We have shown that petitioner's pre-marital sexual conduct, irrespective of the race of her partner, is insufficient, under Florida law, to support the judgment below. We note, however, that even on this issue the Circuit Court seems to have taken note of petitioner's pre-marital sexual relations with her present husband only because of his race. The court's statement (Pet. App. 26) about petitioner's having placed her own gratification ahead of her concern for her child's future welfare appears in the middle of a paragraph otherwise devoted solely to the issue of race. Moreover, the court's concern with petitioner's pre-marital sexual conduct related to the *future* welfare of the child rather than to any concern for her present welfare (*ibid.*). Because the court apparently did not believe that Melanie would suffer from the "social stigmatization" of living in an interracial home until she reached school age (*id.* at 27), the most natural reading of the court's comment about petitioner's pre-marital sexual relations is that it too was based on the race of petitioner's partner.

School District Board of Education v. *Doyle*, 429 U.S. 274, 285-287 (1977).

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

Respectfully submitted.

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No. 82-1734-CSX
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Title: Linda Sidoti Palmore, Petitioner
v.
Anthony J. Sidoti

Docketed:
April 25, 1983

Court: District Court of Appeal of Florida,
Second District

Counsel for petitioner: Shapiro, Robert J.

Counsel for respondent: Hawtrey, John E.

Entry	Date	Note	Proceedings and Orders
1	Apr 25 1983	G	Petition for writ of certiorari filed.
2	Feb 1 1983		Application for stay filed, and order denying same by Powell, J., on Feb. 2, 1983.
3	Feb 3 1983		Application for stay refiled with Marshall, J.
4	Feb 25 1983		Response requested. Due March 2, 1983.
5	Mar 2 1983		Response filed.
6	Mar 7 1983		Denied by order of Court. Justice Stevens would grant.
8	May 13 1983		Order extending time to file response to petition until June 6, 1983.
9	Jun 7 1983		DISTRIBUTED. June 23, 1983
10	Jun 17 1983	F	Response requested.
11	Jul 11 1983		Brief of respondent in opposition filed.
12	Jul 13 1983		REDISTRIBUTED. September 26, 1983
14	Oct 11 1983		REDISTRIBUTED. October 14, 1983
15	Oct 17 1983		Petition GRANTED.
			**********
17	Nov 25 1983		Order extending time to file brief of petitioner on the merits until December 9, 1983.
18	Dec 6 1983	G	Motion of Leigh Earls, et al. for leave to file a brief as amici curiae filed.
19	Dec 9 1983		Brief amicus curiae of Women's Legal Defense Fund, et al. filed.
20	Dec 9 1983		Brief amicus curiae of United States filed.
21	Dec 9 1983		Brief of petitioner Linda Sidoti Palmore filed.
22	Dec 9 1983		Joint appendix filed.
23	Dec 9 1983		Brief amicus curiae of ACLU, et al. filed.
24	Dec 28 1983		Record filed.
25	Jan 9 1984		Motion of Leigh Earls, et al. for leave to file a brief as amici curiae GRANTED.
26	Jan 6 1984		Brief of respondent Anthony J. Sidoti filed.
27	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 22, 1984. (2nd case)
28	Jan 18 1984		CIRCULATED.
29	Feb 22 1984		ARGUED.